Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. ____

In the Supreme Court of the United States

MICHIGAN FAMILY RESOURCES, INC.,
Petitioner,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION (SEIU) LOCAL 517m,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does this Court's decision in *United Paperworkers I'ntl Union, AFL-CIO v. Misco*, 484 U.S. 29 (1987) prohibit the federal courts from vacating a labor arbitrator's decision, where that decision, on its face, conflicts with the clear and unambiguous language of a collective bargaining agreement?

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Plaintiff-Appellee and Petitioner: Michigan Family Resources, Inc.

Defendant-Appellant and Respondent: Service Employees International Union (SEIU) Local 517m.

RULE 29.6 STATEMENT

Petitioner, Michigan Family Resources, Inc., is a non-profit Michigan Corporation. It is not publicly traded. There are not parents or subsidiary corporations.

TABLE OF CONTENTS

QUESTION PRESENTED i

RULE 14.1(b) STATEMENT ii

RULE 29.6 STATEMENT iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES v

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

ARGUMENT 8

CONCLUSION 11

APPENDIX

Appendix A: 1/26/07 Circuit Court Opinion 1a
Appendix B: 1/27/06 Circuit Court Opinion 30a
Appendix C: 11/10/04 District Court Opinion . . . 70a

TABLE OF AUTHORITIES

Cases

Anheuser-Busch, Inc. v. Teamsters Local 744,
280 F.3d 1133 (7th Cir. 2002) 11

Excel Corp. v. United Food and Commercial Workers Union, Local 431,
102 F.3d 1464 (8th Cir. 1996) 11

Georgia Pacific v. United Paper Workers Int'l Union,
864 F.2d 940 (4th Cir. 1988) 10, 11

Michigan Family Resources, Inc. v. Serv. Employees Int'l Union Local 517M,
438 F.3d 653 (6th Cir. 2006) 8

Michigan Family Resources, Inc. v. Serv. Employees Int'l Union Local 517M,
380 F. Supp. 2d 886 (W.D. Mich. 2004) 6, 7

Mountaineer Gas Co., v. Oil Chemical and Atomic Workers Int'l Union Local 3-372,
76 F.3d 606 (4th Cir. 1996) 11

United Paperworkers Int'l Union v. Misco,
484 U.S. 29 (1987) 9

United Steelworkers of America v. Enterprise Wheel & Car Co.,
363 U.S. 593 (1960) 9, 10

United Steelworkers of America v. Warrior and Gulf Navigation Co.,
363 U.S. 574 (1960) 10

Rules

28 U.S.C. § 2101(c) 1

28 U.S.C. §1254(1) 1

29 U.S.C. § 185(a) 2

29 U.S.C. §185 2

Supreme Court Rule 13.1 1

PETITION FOR A WRIT OF CERTIORARI

Michigan Family Resources, Inc. respectfully petitions for a writ of certiorari to review the opinion and judgment of the U.S. Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The *en banc* opinion of thc U.S. Court of Appeals for the Sixth Circuit, dated January 26, 2007, is officially reported at 475 F.3d 746, and is reproduced at App. A., 1a-2a.

The opinion of the U.S. Court of Appeals for the Sixth Circuit, dated January 27, 2006, is officially reported at 438 F.3d 653, and is reproduced at App. B., 3a-69a.

The Memorandum Opinion and Order of the U.S. District Court for the Western District of Michigan, dated November 10, 2004 is officially reported at 380 F. Supp. 2d 886, and is reproduced at App. C., 70a-81a.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Sixth Circuit sought to be reviewed was entered on January 26, 2007. This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the opinion and judgment sought to be reviewed. This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provision involved is 29 U.S.C. § 185(a) which states:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

This case arises out of an arbitration award issued by Arbitrator Mark Glazer on December 10, 2003. The issue involved in the arbitration was whether the collective bargaining agreement required Michigan Family Resources, Inc. ("MFR") to pay a 2.5% wage increase or a 4% wage increase to bargaining unit members in 2003. Though the contract specified a 2.5% increase, and the Arbitrator agreed that the relevant language was clear and unambiguous, he ordered a 4% increase.

MFR filed a lawsuit in the United States District Court for the Western District of Michigan pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. §185, requesting that the arbitration award be vacated. The District Court granted MFR's motion for summary judgment and vacated the award. The SEIU appealed to the United States Sixth Circuit Court of Appeals. A three judge panel of the Court of Appeals affirmed. The SEIU's petition for hearing en banc was granted. On January 26, 2007, in an eight to

five decision, the Sixth Circuit, sitting en banc, reversed the District Court and ordered that the arbitration award be enforced.

MFR is a non-profit corporation which operates the Head Start Program for Kent County, Michigan. The SEIU represents some, but not all of MFR's employees. MFR and the SEIU were parties to a collective bargaining agreement ("contract"), which was effective from June 1, 2001 and expired on May 31, 2005. The Arbitrator's award was issued on December 10, 2003, pursuant to the grievance/arbitration provisions of the contract.

The Arbitrator acknowledged that the controlling contract language was found at Article 35 of the contract and states as follows:

> Bargaining unit members will receive wage increases as follows:
>
> 1) Bargaining unit members will receive the same cost of living increases paid to other MFR employees pursuant to the directive of MFR's funding source. The parties understand that the timing and amount of any such increase is entirely dictated by the funding source.
>
> 2) During the fall semester of each program year, bargaining unit members will be reviewed and will be considered for a merit increase. Merit increases will be made effective as of the date the employee is called back to work at the start of the program year. For twelve month employees, the merit increase will be effective as of August 15 of each year. MFR will guarantee at least that for

> each bargaining unit employee the sum of any COLA paid during the year and the merit increase will be as follows: 2002- 4%, 2003-2.5%, and 2004-3.5%. For example, if the COLA increase for 2004 is 2.5% effective on September 1, 2004, bargaining unit members will receive at least an additional 1%.

It was undisputed, and the Arbitrator found, that the federal government is the funding source referred to in Section 1 of the above quoted language. It was undisputed, and the Arbitrator found, that the federal government notifies MFR after April 18 of each year of the amount of the cost of living increase (COLA) it is directed to give to employees. It was undisputed and the Arbitrator found the COLA increase directed by the federal government for 2003 was 1.5%.

On May 13, 2003, MFR issued a memorandum to bargaining unit employees notifying them of their wage increase for 2003. That memorandum stated that the COLA increase directed by the funding source would be 1.5% for 2003, and that that amount would be paid to employees retroactive to January 1, 2003. It also noted that the union contract required a minimum 2.5% increase, and that the additional 1% increase would be paid to employees when they returned to work at the beginning of the school year.

The SEIU then filed a grievance claiming that since non-bargaining unit employees received a 4% increase, bargaining unit employees should get one as well. While the Arbitrator agreed with the SEIU, his opinion made clear that he deviated from the express and unambiguous language of the contract. First, he acknowledged that Article 35 of the contract "requires SEIU members to receive the same payments from the federal funding source as other employees of the agency."

It is undisputed that the payments employees received from the federal funding source were 1.5%, the amount that MFR paid bargaining unit members. Arbitrator Glazer specifically acknowledged that additional COLA from other sources, "such as from the employer," are not "directly expressed" in Article 35. In other words, he very plainly stated that there was no language in Article 35 which required any COLA payment to bargaining unit members other than the 1.5% directed by the federal funding source.

Nowhere in his opinion did the Arbitrator even claim that this language is ambiguous as written. Arbitrator Glazer acknowledged that it was unambiguous on its face. He wrote in his opinion that the clear language of the contract "becomes ambiguous" because of MFR's conduct. The specific conduct on which the Arbitrator relied to alter this clear contractual language is this: In 2002, a calendar year in which the contract required a 4% wage increase for bargaining unit members, MFR settled a grievance over the timing of the wage increase. The memorandum which MFR issued describing this settlement stated in relevant part as follows:

> For employees covered by the SEIU contract, on a one time non-precedent setting basis, the 4% COLA will be included with the pay checks issued January 25, 2003, rather than the start of the program year August 15, 2002.

Since in 2002, MFR also gave a 4% increase to non-bargaining unit members, the Arbitrator held that this memorandum created a practice which required MFR to always give bargaining unit employees the same raise as non-unit employees, regardless of what the contract said.

Thus, based on the language in a memorandum that was issued on a "one time non-precedent setting basis" to settle a dispute on the timing of a raise, not the amount, Arbitrator Glazer concluded that even though the contract unambiguously provided for a 2.5% raise (1.5% from the federal funding source and an additional 1% merit increase), and said nothing about parity with non-bargaining unit employees, he ordered a 4% raise and required parity with non-bargaining unit employees.

The Arbitrator's decision was in direct conflict with Article 5 § (c) of the contract which limited the Arbitrator's authority when it stated that he "shall not have the authority to change, alter, amend, or deviate from the terms of this collective bargaining agreement in any respect." It was also in direct conflict with the language of Article 34 which stated as follows:

> This agreement expresses the understanding of the parties and it will not be changed, modified, or varied except by written instruments signed by duly authorized agents of the parties hereto. There are no past practices which are binding upon the parties.

It is of critical importance to this petition that throughout this case all involved have acknowledged that the relevant contract language is clear and unambiguous. In his decision at the district court level, Judge Quist wrote:

> The Union agrees with MFR that the language of Article 35 is unambiguous...

* * *

> Having reviewed the relevant provisions of the CBA, the Court agrees with both parties on one indisputable point: the provisions of Article 35 regarding wages are clear and unambiguous.

Michigan Family Resources, Inc. v. Serv. Employees Int'l Union Local 517M, 380 F. Supp. 2d 886. 889-90 (W.D. Mich. 2004).

Here is what the SEIU said in the briefs it submitted to Judge Quist about the language at issue.

> The Union agrees that the language of the labor agreement is absolutely clear and unambiguous .... The clear and unambiguous language of Article 35 ....
>
> * * *
>
> The Defendant/Union answers yes and agrees with Plaintiff that the language of the contract in Article 35: Wages is clear and unambiguous.
>
> * * *
>
> Plaintiff and Defendant are in accord that the language of Article 35: Wages, of the collective bargaining agreement is clear and unambiguous.
>
> * * *
>
> The Article 35 formula for annual wage calculation is clear and unambiguous.
>
> That the language of Article 35: Wages is clear and unambiguous appears to be the only point of

> agreement between the Parties to the collective bargaining agreement here.

The panel's decision at the Sixth Circuit level recognized that the language at issue is clear and unambiguous. Thus the Panel in its decision said that the contract provisions at issue "admit of one proper interpretation". *Michigan Family Resources, Inc. v. Serv. Employees Int'l Union Local 517M*, 438 F.3d 653, 657 (6th Cir. 2006). The Panel also said:

> Given this clarity in the agreement, the arbitrator also had no basis for consulting evidence of the party's custom of granting wage increases and no basis for invoking that custom as a source in construing the agreement. "[P]ast practice or custom should not be used to interpret or give meaning to a provision or clause of the collective bargaining agreement that is clear and unambiguous."

Arbitrator Glazier expressly acknowledged that the language on its face was clear and unambiguous when he said in his decision "I am persuaded that the above language becomes ambiguous because of the employer's prior decision to characterize both its individual payment and its payment from the federal funding source as COLA." If the arbitrator was persuaded that the language became ambiguous because of some practice, that necessarily means that without the practice the language would not be ambiguous. In other words, the language itself is clear and unambiguous.

ARGUMENT

The mistake which the Sixth Circuit has made, and which MFR submits requires correction by this Court, is that its *en banc* decision effectively prevents any judicial review of an

arbitrator's decision, no matter how offensive the decision is to the collective bargaining agreement. It requires the courts to do nothing even when an arbitrator exceeds the authority granted by contract and rewrites the parties' agreement. The Sixth Circuit comes to this conclusion by misinterpreting this Court's decision in *United Paperworkers Int'l Union v. Misco*, 484 U.S. 29 (1987). The Sixth Circuit's *en banc* decision effectively denies a court the authority to vacate a labor arbitrator's award unless it can be shown that the award is the result of fraud, dishonesty or conflict of interest.

The language from *Misco*, which the Sixth Circuit claims requires this result, is the following:

> But as long as the arbitrator is even arguable construing or applying the contract, and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision. *Misco* at 371.

Relying on *Misco,* the Sixth Circuit goes on to say that the arbitrator's award must be enforced because it was not infected by "fraud, conflict of interest or dishonesty." The Court held this even though the contract expressly denied the arbitrator the authority "to change, alter, amend or deviate from the collective bargaining agreement in any respect."

That an arbitration decision is unenforceable where the arbitrator exceeds authority granted him by the parties is a common theme that has guided courts in these cases since the very beginning. In *United Steelworkers of America v. Enterprise Wheel & Car Co.*, 363 U.S. 593, 597 (1960) the Supreme Court penned its often-quoted language confining arbitrators to "interpretation and application of a collective bargaining agreement," requiring that arbitration decisions

draw their "essence from the collective bargaining agreement," admonishing arbitrators from dispensing "their own brand of industrial justice," and directing lower courts to "refuse enforcement of the award" if "the arbitrator's words manifested infidelity to his obligation [to interpret and apply the collective bargaining agreement]." After announcing these principles, the first thing the Supreme Court did was analyze whether the arbitrator had "exceeded the scope of the submission." *Id.* In fact, the Court said that when an arbitrator exceeds the authority granted to him by the parties, he "abuse[s] the trust the parties confided in him... ." *Id.* at 598.

In *United Steelworkers of America v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960), the Supreme Court emphasized the contractual basis for the arbitrator's authority.

> For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to so arbitrate....[t]he judicial inquiry under § 301 must be strictly confined to the question of whether the reluctant party did agree to arbitrate the grievance **or did agree to give the arbitrator power to make the award he made**.

Id. at 582 (emphasis added).

Following the Supreme Court's directive, the circuit courts have measured the scope of the arbitrator's authority by the language of the collective bargaining agreement, and have refused to enforce awards that exceed the authority which the contract grants. Thus, for example, in *Georgia Pacific v. United Paper Workers Int'l Union*, 864 F.2d 940 (4th Cir. 1988), where the contract said that "the arbitrator shall not modify, change or add to this Agreement," the

Court, taking direction from *Misco*, refused enforcement. Because the award conflicted with clear and unambiguous contract language, the Court said that the arbitrator "abused his power" by exceeding the authority the contract granted to him. *Id.* at 945.

The result and reasoning in *Georgia Pacific* is typical. Where the collective bargaining agreement specifically denies the arbitrator the authority to amend or modify the agreement, federal courts routinely deny enforcement when the award conflicts with clear and unambiguous contract language. *See e.g. Excel Corp. v. United Food and Commercial Workers Union, Local 431*, 102 F.3d 1464 (8th Cir. 1996); *Mountaineer Gas Co., v. Oil Chemical and Atomic Workers Int'l Union Local 3-372*, 76 F.3d 606 (4th Cir. 1996); *Anheuser-Busch, Inc. v. Teamsters Local 744*, 280 F.3d 1133 (7th Cir. 2002).

Thus the Sixth Circuit's decision, which requires that an arbitration award be enforced even when it conflicts with unambiguous contract language, is itself in conflict with the approach taken by the Fourth, Seventh and Eighth Circuits, and violates principles established by this Court in the Steelworkers Trilogy. The effect of the Sixth Circuit's decision is that it denies the parties the right to limit the scope of an arbitrator's authority. The Sixth Circuit has gone too far in its application of *Misco*. It denies critical aspects of this Court's body of decisions on this issue and should be corrected.

CONCLUSION

For the reasons stated above, MFR argues that its Petition for Writ of Certiorari be granted.

Respectfully Submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 04-2564

[Filed January 26, 2007]

MICHIGAN FAMILY RESOURCES, INC. Plaintiff-Appellee,	)
v.	)
SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL NO. 517M, Defendant-Appellant.	)

On Appeal from the United States District Court
for the Western District of Michigan at Grand Rapids
No. 04-00019–Gordon J. Quist, District Judge

OPINION

Before: BOGGS, Chief Judge; MARTIN, BATCHELDER, DAUGHTREY, COLE, CLAY, GILMAN, GIBBONS, ROGERS, SUTTON, COOK, McKEAGUE, and GRIFFIN, Circuit Judges. SUTTON, J., delivered the opinion of the

court, in which BOGGS, C. J., DAUGHTREY, COLE, ROGERS, COOK, McKEAGUE, and GRIFFIN, JJ., joined. MARTIN, J. delivered a separate opinion concurring in part and dissenting in part, in which CLAY and GILMAN, JJ., joined with GIBBONS, J. also delivering a separate opinion concurring in part and dissenting in part, in which BATCHELDER, J., joined.

SUTTON, Circuit Judge. Local 517M of the Service Employees International Union challenges the decision of the district court vacating an arbitration award in its favor. Because the arbitrator was "acting within the scope of his authority" in resolving this dispute, because the company has not charged the arbitrator with fraud or dishonesty in making the award, because the arbitrator was "arguably construing... the contract" when he awarded union employees a 4% cost-of-living increase for 2003 and because the company has shown no more than that the arbitrator made an error, perhaps even a "serious error," in interpreting the contract, we reverse and direct the district court to enter an order enforcing the award. *See United Paperworkers Int'l Union, AFL-CIO v. Misco*, 484 U.S. 29, 38-39, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987).

I.

Michigan Family Resources (MFR) runs the federal Headstart Program that serves Kent County, which lies in western Michigan. Local 517M of the Service Employees International Union represents some of MFR's employees. On behalf of its members, the union negotiated a collective bargaining agreement with MFR that entitled its members to annual wage increases. The agreement contains four pertinent provisions.

Article 35(1) of the agreement provides:

> Bargaining unit members will receive the same cost of living increases paid to other MFR employees pursuant to the directive of MFR's funding source. The parties understand that the timing and amount of any such increase is entirely dictated by the funding source.

JA 43. The "funding source" mentioned in this provision, the parties agree, refers to the federal government.

Article 35(2) provides:

> During the fall semester of each program year, bargaining unit members will be reviewed and will be considered for a merit increase... MFR will guarantee at least that for each bargaining unit employee the sum of any COLA [*i.e.*, cost-of-living increase] paid during the year and the merit increase will be as follows: 2002 - 4%; 2003 - 2.5%; 2004 - 3.5%. For example, if the [cost-of-living] increase for 2004 is 2.5%, effective on September 1, 2004 bargaining unit members will receive at least an additional 1.0%.

JA 43-44.

Article 5 provides an "exclusive method of resolving" disputes arising under the agreement and requires the parties to arbitrate any grievances that they cannot resolve on their own. The arbitrator, it says, "shall have full authority to render a decision which shall be final and binding upon both parties and the employees, except that the arbitrator shall not have authority to change, alter, amend, or deviate from the terms of this collective bargaining agreement in any respect."

Article 5(c). The provision also says that "[i]f the Union requests arbitration, the parties shall choose an arbitrator by selecting from the following list through the alternating strike method: Mario Chiesa[,] Mark Glazer[,] William Daniel[,] George Roumell and Lamont Stallworth." *Id.*

Article 34 provides that the agreement "expresses the understanding of the parties and it will not be changed, modified, or varied, except by written instrument signed by duly authorized agents of the party thereto," and that "[t]here are no past practices which are binding upon the parties." JA 43.

In May 2003, MFR notified the union employees that they would receive a 2.5% cost-of-living increase for 2003--1.5% from the "funding source" (*i.e.*, the federal government), 1% from MFR--while non-union employees would receive a 4% cost-of-living increase for the year. Although the 2003 pay increase for union employees satisfied the collective bargaining agreement's minimum requirement for that year (2.5%), the union claimed that the agreement required parity between union and non-union employees in the payment of cost-of-living increases. The union, as a result, filed a grievance against MFR. In accordance with the agreement, the parties engaged one of the designated arbitrators to resolve the dispute.

On December 10, 2003, the arbitrator issued a ten-page opinion resolving the dispute in favor of the union. The question, as he saw it, was "whether Article 35 requires MFR to provide parity in [cost-of-living] payments for its [union] employees when non-Union employees receive higher...payments." Arb. Op. at 2. On this point, the arbitrator reasoned, Article 35 was not entirely clear. While it required union members to "receive the same payments

from the federal funding source as other employees, "it did not directly address "the cost of living increases from other sources, such as from the Employer." *Id.* at 7. The arbitrator then noted that before and after the adoption of the collective bargaining agreement, MFR granted the same cost-of-living increase to all employees, regardless of union affiliation. *Id.* at 8. MFR never held merit reviews, he added, and in a 2002 memo (dealing with pay increases for the first year of the collective bargaining agreement) it characterized the entire wage increase to union employees as a cost-of-living increase. "I am persuaded," the arbitrator then concluded, "that [Article 35] becomes ambiguous because of the Employer's prior decision to characterize both its individual payment and its payment from the federal funding source as [cost of living]." *Id.* In the end he resolved this ambiguity based on the employer's prior practice of granting identical cost-of-living increases to all employees and awarded union members an equivalent 4% cost-of-living increase.

On January 9, 2004, invoking § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, MFR filed a complaint in federal court seeking to vacate the award. On November 10, 2004, the district court granted MFR's motion for summary judgment, holding that "the Arbitrator's award does not draw its essence from the [collective bargaining agreement] because the Arbitrator considered evidence to aid in construing the [collective bargaining agreement] when, in fact, no construction was necessary." D. Ct. Op. at 6. "[T]he Arbitrator," the court concluded, "went beyond the express terms of the [collective bargaining agreement] by imposing additional requirements upon the parties and considering past practices, which are specifically disclaimed by the [collective bargaining agreement's] waiver provision." *Id.*

A panel of this court affirmed, *Mich. Family Res., Inc. v. Serv. Employees Int'l Union Local 517M*, 438 F.3d 653 (6th Cir. 2006), and applied this court's four-part test for assessing arbitration awards in doing so, *see Cement Divs., Nat'l Gypsum Co. v. United Steelworkers of America, AFL-CIO-CLC, Local 135*, 793 F.2d 759 (6th Cir. 1986). The union petitioned for and we granted en banc review. *See* 2006 U.S. App. LEXIS 11479 (6th Cir. May 5, 2006).

II.

A.

In 1960, the Supreme Court issued three decisions designed to end the federal courts' hostility to labor-arbitration awards. In one of those decisions, *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960), the Court held that while federal courts, not arbitrators, should determine whether a collective bargaining agreement requires a dispute to be resolved through arbitration, "[d]oubts should be resolved in favor of coverage," and "[a]n order to arbitrate...should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Id.* at 582-83. In another decision, *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564, 80 S. Ct. 1343, 4 L. Ed. 2d 1403 (1960), the Court held that if the collective bargaining agreement provided that a dispute should be submitted to arbitration, the underlying "question of contract interpretation [is] for the arbitrator," even though the claim in the court's eyes appears to be a "frivolous" one. *Id.* at 568. "The courts," it pointed out, "have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular

language in the written instrument which will support the claim." *Id.*

In the final case, the one most pertinent here, *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960), the Court considered the role of the federal courts in enforcing arbitration awards. "The refusal of courts to review the merits of an arbitration award," it began, "is the proper approach to arbitration under collective bargaining agreements" because "[t]he federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards." *Id.* at 596. Observing that the court of appeals' refusal to enforce the award in that case was not "based upon any finding that the arbitrator did not premise his award on his construction of the contract," but was based "merely" on "disagree[ment] with the arbitrator's construction of it," the Court reversed. *Id.* at 598. The company's primary argument in favor of declining to enforce the award, the Court explained, was that "by applying correct principles of law to the interpretation of the collective bargaining agreement it can be determined that the agreement did not...provide" for this kind of award, "and that therefore the arbitrator's decision was not based upon the contract." *Id.* Yet that approach, the Court countered, "would require courts, even under the standard arbitration clause, to review the merits of every construction of the contract" and "would make meaningless the provisions that the arbitrator's decision is final" because it never would be. *Id.* at 598-99. "[S]o far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." *Id.* at 599. Only when an arbitrator declines to confine himself "to interpretation and application" of the agreement and instead opts to "dispense his own brand of industrial justice"

may the courts refuse to enforce an award. *Id.* at 597. Thus while the arbitrator may "look for guidance from many sources" in construing the agreement, "his award is legitimate only so long as it draws its essence from the collective bargaining agreement." *Id.*

In the years after what came to be known as the *Steelworkers Trilogy*, our court refereed numerous disputes over what it means for an award to "draw its essence" from the collective bargaining agreement. Attempting to summarize those decisions, we eventually announced a four-part inquiry for determining whether to enforce an arbitration award. "An award fails to draw its essence from the agreement," we stated, when (1) it "conflicts with express terms of the collective bargaining agreement; (2) [it] imposes additional requirements that are not expressly provided in the agreement; (3) [it] is without rational support or cannot be rationally derived from the terms of the agreement; and (4) [it] is based on general considerations of fairness and equity instead of the precise terms of the agreement." *Cement Divs., Nat'l Gypsum Co. v. United Steelworkers, Local 135*, 793 F.2d 759, 766 (6th Cir. 1986) (citations omitted). If a dissatisfied party to an arbitration satisfied any one of these tests, we held, the court should not enforce the award. *See Wyandot, Inc. v. Local 227, United Food & Commercial Workers Union*, 205 F.3d 922, 929 n.3 (6th Cir. 2000).

During the 20 years since *Cement Divisions*, the Supreme Court has refined the standard of review in this area in two cases, both of which suggest that *Cement Divisions* gives federal courts more latitude to review the merits of an arbitration award than the Supreme Court permits. In 1987, just one year after *Cement Divisions*, the Court considered "when a federal court may refuse to enforce an arbitration award rendered under a collective-bargaining agreement" in

United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 31, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987). Elaborating on the *Steelworkers Trilogy*, *Misco* reminded litigants that the courts have a "limited role" when the losing party to an arbitration seeks judicial intervention. *Id.* at 36. The federal courts retain authority to ensure that the arbitration award grows out of a legitimate process: that the collective bargaining agreement commits the dispute at hand to arbitration, *id.* at 38 (requiring the arbitrator to "act[] within the scope of his authority"); that the prevailing party did not procure the decision through "fraud," *id.*; that the arbitrator did not suffer from a conflict of interest or exercise "dishonesty" in reaching his decision, *id.*; and that the arbitration award did not merely reflect "the arbitrator's own notions of industrial justice," *id.*

Otherwise, *Misco* explained, "[t]he courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract." *Id.* at 36. "Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept." *Id.* at 37-38. In attempting to clarify the line between an award that permissibly "draws its essence from the contract" and one that impermissibly "reflect[s] the arbitrator's own notions of industrial justice," the Court gave this guidance: "[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *Id.* at 38. Consistent with this frame of reference, the Court upheld the award in that case because the arbitrator arguably was construing and applying the

contract and because the decision involved at worst "improvident, even silly," decisionmaking. *Id.* at 39.

Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 121 S. Ct. 1724, 149 L. Ed. 2d 740 (2001), reinforced the federal courts' modest role in this area. In summarily reversing a court of appeals' decision, the Court explained that the federal courts' review of labor-arbitration decisions is not just "limited," *Misco*, 484 U.S. at 36; it is "very limited," *Garvey*, 532 U.S. at 509. Rather than asking whether the arbitration award "draws its essence from the contract," the Court asked whether the arbitrator was "'even arguably construing or applying the contract.'" *Id.* at 509 (quoting *Misco*, 484 U.S. at 38). "[O]nly when the arbitrator strays from interpretation and application," the Court explained, does he enter the forbidden world of "effectively 'dispens[ing] his own brand of industrial justice,'" making the arbitrator's decision "unenforceable." *Id.* at 509 (quoting *Enterprise Wheel*, 363 U.S. at 597). But when "an arbitrator resolves disputes regarding the application of a contract, and no dishonesty is alleged, the arbitrator's 'improvident, even silly, factfinding' does not provide a basis for a reviewing court to refuse to enforce the award." *Id.* (quoting *Misco*, 484 U.S. at 39).

Misco and *Garvey* refine the *Steelworkers Trilogy* in two ways. One, they define the line between a permissible award (that "draws its essence from the contract") and an impermissible award (that "simply reflect[s] the arbitrator's own notion[] of industrial justice") based on whether "the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority." *Misco*, 484 U.S. at 38; *see Garvey*, 532 U.S. at 509. Two, *Misco* and *Garvey* show that the Court means what it is saying. In both cases, the Court held that once it was established that the arbitrator was

construing or applying the contract (and acting within the scope of his authority), it made no difference whether the arbitrator had committed "serious," "improvident" or even "silly" errors in resolving the merits of the dispute. *Misco*, 484 U.S. at 38-39; *Garvey*, 532 U.S. at 509-10.

Our decision in *Cement Divisions* of course does not reflect these refinements of the *Steelworkers Trilogy* because the court had no reason to know they existed. Accordingly, instead of continuing to apply *Cement Divisions*' four-part inquiry, a test we now overrule, we will consider the questions of "procedural aberration" that *Misco* and *Garvey* identify. *Misco*, 484 U.S. at 40 n.10. Did the arbitrator act "outside his authority" by resolving a dispute not committed to arbitration? Did the arbitrator commit fraud, have a conflict of interest or otherwise act dishonestly in issuing the award? And in resolving any legal or factual disputes in the case, was the arbitrator "arguably construing or applying the contract"? So long as the arbitrator does not offend any of these requirements, the request for judicial intervention should be resisted even though the arbitrator made "serious," "improvident" or "silly" errors in resolving the merits of the dispute.

These relatively straightforward inquiries, we acknowledge, mask a harder question: What role, if any, still remains for a court to consider the arbitrator's resolution of the merits in determining whether he was "arguably construing" the contract? The union, supported by the national AFL-CIO, argues that the court's view of the merits has nothing to do with this process-driven question. So long as the arbitrator purported to construe the contract, that is the end of the matter. MFR argues by contrast that federal courts always must consider the merits of a dispute to determine whether the arbitrator was arguably construing the contract.

We respectfully disagree with both of them. The Court's repeated insistence that the federal courts must tolerate "serious" arbitral errors suggests that judicial consideration of the merits of a dispute is the rare exception, not the rule. At the same time, we cannot ignore the specter that an arbitration decision could be so "ignor[ant]" of the contract's "plain language," *Misco*, 484 U.S. at 38, as to make implausible any contention that the arbitrator was construing the contract. An interpretation of a contract thus could be "so untethered to" the terms of the agreement, to borrow a phrase from our Circuit Justice, *Garvey*, 532 U.S. at 512 (Stevens, J., dissenting), that it would cast doubt on whether the arbitrator indeed was engaged in interpretation. Such an exception of course is reserved for the rare case. For in most cases, it will suffice to enforce the award that the arbitrator appeared to be engaged in interpretation, and if there is doubt we will presume that the arbitrator was doing just that. *Cf. Warrior & Gulf*, 363 U.S. at 582-83 ("An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.").

This view of the "arguably construing" inquiry no doubt will permit only the most egregious awards to be vacated. But it is a view that respects the parties' decision to hire their own judge to resolve their disputes, a view that respects the finality clause in most arbitration agreements, *see* JA 27 (stating that "the arbitrator shall have full authority to render a decision which shall be final and binding upon both parties"), and a view whose imperfections can be remedied by selecting better arbitrators.

B.

Gauged by these modest requirements, the arbitrator's award in this case must be enforced. Nothing in the record, nothing the parties have told us, suggests that fraud, a conflict of interest or dishonesty infected the arbitrator's decision or the arbitral process. And no one disputes that the collective bargaining agreement committed this grievance to arbitration or disputes that this arbitrator was one of the five arbitrators selected by the parties to be eligible to resolve this dispute. The arbitrator, in short, was acting within the scope of his authority.

That leaves the question whether the arbitrator was engaged in interpretation: Was he "arguably construing" the collective bargaining agreement? The arbitrator's ten-page opinion has all the hallmarks of interpretation. He refers to, quotes from and analyzes the pertinent provisions of the agreement, and at no point does he say anything indicating that he was doing anything other than trying to reach a good-faith interpretation of the contract.

Neither can it be said that the arbitrator's decision on the merits was so untethered from the agreement that it casts doubt on whether he was engaged in interpretation, as opposed to the implementation of his "own brand of industrial justice." When it comes to parity between union and non-union cost-of-living increases--the issue before the arbitrator--the agreement is clear in one respect but silent in another. On the one side of the ledger, Article 35(1) of the agreement says that *government-funded* cost-of-living increases must be distributed equally, providing that "[b]argaining unit members will receive the same cost of living increases paid to other MFR employees pursuant to the directive of MFR's funding source." JA 43. Whatever cost-of-living increase "MFR's

funding source" (namely, the federal government) provides in a given year, then, that funding must be allocated equally in terms of percentage salary increases to union and non-union members alike. On the other side of the ledger, Article 35(1) says nothing about parity when it comes to *employer-funded* cost-of-living increases. Viewed from the vantage point of Article 35(1), the agreement is silent about whether parity must exist between union and non-union cost-of-living increases funded by the employer.

Other provisions of the agreement do not eliminate this ambiguity. Article 35(2) addresses merit increases and says that "bargaining unit members will be reviewed and will be considered for a merit increase" each year. But this sentence says nothing about cost-of-living increases, and MFR premised its 2003 salary increases on changes to the cost of living.

Article 35(2) also "guarantee[s]" each union employee a minimum salary increase for each of the three years of the agreement, so that "the sum of any COLA [*i.e.*, cost-of-living increase] paid during the year and the merit increase will be as follows: 2002 - 4%; 2003 - 2.5%; 2004 - 3.5%. For example, if the [cost-of-living] increase for 2004 is 2.5%, effective on September 1, 2004 bargaining unit members will receive at least an additional 1.0%." JA 43-44. But by setting a floor for salary increases to union employees during these three years, the agreement did not impose a ceiling on those increases. The agreement thus is silent about increases over the floor for union employees and about whether increases over the floor should be given to union and non-union employees on an equivalent basis.

In the face of this contractual silence, the arbitrator did what all adjudicators do under these circumstances: looked for

other indicators of meaning. In attempting to resolve this ambiguity, he had at least three paths open to him. In the first place, he could have noted that the agreement is utterly silent about whether there must be parity in employer-funded cost-of-living increases, then drawn an inference from the employer's application of the agreement during its first year. Because MFR had awarded equal employer-funded cost-of-living increases in 2002, the arbitrator could have drawn the inference that the parties' application of the agreement reflected their understanding of it. This approach would not have violated Article 34's instruction that "[t]here are no *past practices* which are binding upon the parties," JA 43 (emphasis added), and indeed Article 34's prohibition only on using past practices to "bind[]" the parties also might well have permitted the arbitrator to draw an inference from the fact that the employer's practice before this collective bargaining agreement had been the same--to give equal cost-of-living adjustments.

Instead of relying on this inference, the arbitrator took a different tack. He determined that the "above language"--Article 35(1)'s mandate that "[b]argaining unit members will receive the same cost of living increases paid to other MFR employees pursuant to the directive of MFR's funding source," *id.*--"*becomes ambiguous* because of the Employer's prior decision to characterize both its individual payment and its payment from the federal funding source as [cost of living]." Arb. Op. at 8 (emphasis added). In other words, because the employer traditionally gave federally funded *and* its own cost-of-living increases, the arbitrator took the "same cost of living increases" language in Article 35(1) to require parity for all such increases. This train of reasoning, however, contains two serious flaws. Later language in this sentence ("pursuant to the directive of MFR's funding source") shows that the provision refers only to parity for

federally funded cost-of-living increases. And the clear meaning of this sentence does not "become[] ambiguous" based on a party's interpretation of it.

Whether the "becomes ambiguous" phrase was a slip of the pen or a slip in thought, it bears emphasizing that it was still "the above language"--the contract language--that he was trying to figure out. And the fact remains that the agreement was utterly silent, and thus already ambiguous, on the point at hand: Did the contract tell MFR whether there should be parity in employer-funded cost-of-living increases? That ambiguity permitted, indeed required, the arbitrator to engage in construction of the agreement, which is all we are asked to determine. That he chose the wrong path in justifying the award, however, does not give us a warrant to vacate it. If it is true that appellate courts generally "review[] judgments, not opinions" while performing de novo review, *Chevron USA Inc. v. Nat'l Res. Def. Council*, 467 U.S. 837, 842, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984), it is assuredly true that we review outcomes, not opinions, while performing the exceedingly deferential task of considering whether to vacate an arbitration award. Add to this the fact that arbitrators in this area may be, and frequently are, non-lawyers (and therefore hardly inculcated in all of the nuances of contract interpretation), that arbitrators have no obligation to issue a written decision to justify their awards, *see Enterprise Wheel*, 363 U.S. at 598, and that vacating awards based on flawed chains of reasoning may well encourage arbitrators to "play it safe by writing no supporting opinions," *id.*, and it becomes clear that this award should be enforced.

Through all of this, it needs to be emphasized, we do not endorse either of the above paths of reasoning--either the one the arbitrator took or the one he could have taken. For our part, the better course for the arbitrator would have been to

say that the agreement's explicit parity requirements for government-funded, cost-of-living increases implied that the parties did not mean to create other parity requirements. And indeed had a district court in a diversity case faced this question, we might well have demanded that answer in conducting plenary review of the issue. But that of course is not the point. That the deciphering of this contract required implications and inferences suffices by itself to show that the arbitrator was permissibly engaged in interpretation. The arbitrator, it is true, made a legal error, perhaps even a serious legal error, but an error of interpretation nonetheless, which does not authorize us to vacate the award. It was the "arbitrator's construction," not three layers of federal judicial review, that the parties "bargained for," and that delegation of decision-making authority must be respected even when time and further review show that the parties in the end have bargained for nothing more than error.

MFR persists that if the arbitrator erred, then he must have exceeded his authority because Article 5(c) of the collective bargaining agreement says "that the arbitrator shall not have authority to change, alter, amend, or deviate from the terms of this collective bargaining agreement in any respect." Not so. An arbitrator does not exceed his authority every time he makes an interpretive error; he exceeds that authority only when the collective bargaining agreement does not commit the dispute to arbitration. Otherwise, every error would be grounds for judicial intervention, which is inconsistent with the Supreme Court's insistence that we must tolerate "serious," "improvident" and "silly" legal and factual arbitral errors and which is inconsistent with another provision of this collective bargaining agreement (and most collective bargaining agreements): that the arbitrator "shall have full authority to render a decision which shall be final and binding upon both parties." No decision would be final,

to say nothing of "speedy," *Misco*, 484 U.S. at 38, if the losing party needed only to allege an interpretive error to invoke the intervention of the federal courts. True, no arbitration agreement (and certainly not this one) explicitly gives the arbitrator jurisdiction to *misapprehend* the agreement, and neither for that matter does Title 28 of the United States Code explicitly give appellate courts jurisdiction to affirm legal errors. But that is the import of having a finality clause in an arbitration agreement, the import of the Supreme Court's decisions in this area over the last 47 years and, so far as our jurisdiction is concerned, the import of asking fallible human beings to make final sense of imperfectly worded documents. In the last analysis, we have an arbitrator who plainly was "arguably construing" the contract and who perhaps just as plainly made a "serious error" in construing the contract, a confluence of circumstances that does not invest us with authority to "overturn [the] decision." *Garvey*, 532 U.S. at 509. The award must be enforced.

III.

For these reasons we reverse and remand the case so that the district court may enter an order enforcing the arbitration award.

CONCURRING IN PART, DISSENTING IN PART

BOYCE F. MARTIN, JR., Circuit Judge, with whom CLAY and GILMAN, Circuit Judges, join concurring in part and dissenting in part.

I.

My dissent is a narrow one: I agree with the majority in principle, but not in application. As to principle, I agree with the majority's conclusion that this Court's *Cement Divisions* test be dropped. *See* Maj. Op. at 6. The four-part *Cement Divisions* inquiry has allowed this Court too much latitude to review the merits of arbitrator interpretations of collective bargaining agreements, in contravention of the dictates of the Supreme Court's *Steelworkers Trilogy* as clarified in *Misco* and, to a lesser extent, *Garvey*. *Cement Divisions* should consequently be replaced by a test more reflective of *Misco* and *Garvey*, i.e., something to the tune of "as long as the arbitrator is arguably construing the contract or applying the contract and acting within the scope of his authority, this court will not overturn his decision."

Of course, simply replacing this Court's test with that of the Supreme Court does not advance matters much, especially since the Supreme Court has provided us with only two post-*Trilogy* cases for guidance. *See Garvey*, 532 U.S. at 512 (noting that the Supreme Court's cases "do not provide significant guidance as to what standards a federal court should use in assessing whether an arbitrator's behavior is so untethered to either the agreement of the parties or the factual record so as to constitute an attempt to 'dispense his own brand of industrial justice'") (Stevens, J., dissenting). To be fair, the majority appears to replace *Cement Divisions* with an inquiry that looks only for "procedural aberration" committed by the arbitrator, not for legal error. Maj. Op. at 6. The majority then posits a series of hypotheticals to indicate when such procedural aberrations might have occurred. This is an admirable start, especially since the majority writes from a clean slate. But the contours of "procedural aberration"--or, if one prefers, when an arbitrator is not "arguably construing

or applying the collective bargaining agreement, and acting within the scope of his authority"--can only be defined as we apply this new test to new, discrete cases. After all, "[t]he glory of the Anglo-American system of adjudication is that general principles are tested in the crucible of concrete controversies. A court cannot be assumed to address and resolve in the case in which it first lays down a rule every controversy within the semantic reach of the rule." *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1312 (7th Cir. 1989). *Misco* was a relatively easy case, because the appeals court there applied vague notions of public policy to overturn the arbitrator's decision. *Garvey* was also easier than the case we review now, because in *Garvey* the appeals court attempted to substitute its own credibility determination (a factual finding) for that of the arbitrator. Here, however, we deal with an arbitrator's decision that a term of the collective bargaining agreement "becomes ambiguous." This is completely non-sensical because it implies that the term was unambiguous to begin with.

Thus I turn to the application of the majority's new standard. Arbitrator Glazer began his analysis by quoting the relevant pay raise parity language in Article 35 of the collective bargaining agreement: "Bargaining unit members will receive the same cost of living ["COLA"] increases paid to other MFR employees pursuant to the directive of MFR's funding source." Arb. Op. at 7. As the majority correctly points out, the plain meaning of this parity provision does not jump off the page. Because MFR's "funding source" is the federal government, Article 35 clearly requires union/non-union parity as to government-funded cost-of-living increases. But Article 35 says little about union/non-union parity as to employer-funded cost-of-living increases, the key issue here. Had Glazer found that the Article 35 parity clause was *inherently* ambiguous, then there is some merit to the

majority's argument that this finding, even if erroneous, is unreviewable inasmuch as it represents an arbitrator's attempt to "arguably construe" the collective bargaining agreement. But Glazer ruled, instead, that Article *becomes* ambiguous "because of [MFR's] prior decision to characterize both its [employer] payment and its payment from the federal funding source as 'COLA.'" Arb. Op. at 8. This is where Glazer's opinion is woefully flawed.

First, to say that a clause *becomes* ambiguous makes little sense in the realm of contract interpretation, because it implies that the clause was *un*ambiguous to begin with. And if that were the case, then Glazer would have no business bringing in extrinsic evidence to construe it. The majority views Glazer's use of the phrase "becomes ambiguous" as either a slip of the pen or a slip of thought. Maj. Op. at 8. This may or may not be true, but I am less willing than the majority to give the arbitrator the benefit of the doubt. The majority opines that either way, Glazer was faced with "contractual silence," and thus it was proper for him to look for "other indicators of meaning." Maj. Op. at 7. Another plausible reading of Glazer's opinion, however, is that he viewed--rightly or wrongly--the Article 35 plain language as *unambiguous*, and then went beyond the scope of his authority in subsequently "rendering" it ambiguous.

Furthermore, even if the majority is correct that Glazer was faced with "contractual silence," that does not automatically mean his subsequent interpretation of this silence must evade our review. In this case, cost-of-living increases from sources other than the "funding source"--here, the federal government--are simply not provided for by the collective bargaining agreement, and so it is not at all clear why union employees should have a right to such a benefit in the absence of express language creating that benefit in the

agreement itself. In other words, Article 35 does not require further construction as to cost-of-living increases from non-federal sources. To say that Glazer was "arguably construing" something that requires no further construction is to say that Glazer was acting beyond the scope of his authority as an arbitrator. Contractual *silence* does not always equal contractual *ambiguity*.

Second, the alleged "past practice" that Glazer uses to render the Article 35 parity provision ambiguous, Arb. Op. at 8, is actually a "past memorandum" discussing raises for contract year 2002 (as opposed to contract year 2003, the dispute over which spawned the arbitration at issue in this case). And yet the memorandum clearly states that the 2002 raises are being given on a "one-time, non-precedent setting basis." In light of this language, for Glazer to have used the 2002 memorandum as a precedent to render Article 35 ambiguous simply contravenes common sense. In my opinion, then, Arbitrator Glazer clearly acted beyond the scope of his authority in finding new meaning in Article 35 of the collective bargaining agreement. Or if the majority prefers, Glazer's actions were procedurally aberrant for those of a professional labor arbitrator.

II.

Let me be clear about what I am *not* saying. I am not suggesting that we decide an arbitration case such as this one on the merits. I am simply suggesting that we affirm the judgment of the district court, which was to vacate the award and remand for further proceedings--i.e., for re-arbitration, or at the very least for a clarification by Arbitrator Glazer. And I am not suggesting that upon re-arbitration, or upon further clarification, the decision of the arbitrator has to be

different.[1] And contrary to what the majority suggests, a decision simply to vacate and remand an arbitration award, as opposed to a decision that *reverses* the award on the merits, is not inconsistent with the high level of deference that we must show to arbitrators' decisions regarding collective bargaining agreements. The majority reasons that since appellate courts generally "review judgments, not opinions" while performing de novo review, therefore we must assuredly "review outcomes, not opinions" while performing hyper-deferential arbitrator award review. Maj. Op. at 8. I disagree. This Court routinely reviews a lower court's *reasoning* (i.e., *process* on de novo review, even if such review has no bearing on our affirmance of the *outcome* of the case. Appellate courts constantly write de novo review opinions including such language as: "While we disagree with the district court's analysis of the issue, we nevertheless affirm." Why do we do this? Because process and reasoning are important, as they provide the justification and backbone for outcomes. And in a hyper-deferential review situation, as opposed to de novo review, process is often the only thing we *can* review.

Some may think that my position seems contrary to that outlined by the Supreme Court in its *Steelworkers Trilogy*:

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[1] This is not an absurd result. In sentencing cases, for example, we are often fully aware that a trial judge may issue exactly the same sentence, or perhaps even a *higher* one, on remand for re-sentencing. What we are typically asking for in such cases is that the trial judge simply clarify his reasons for issuing the sentence (e.g., that he was treating the Sentencing Guidelines as advisory only, or that he had assessed all of the § 3553 factors), not that the trial judge substitute *our* reasons for his own.

> A mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award. Arbitrators have no obligation to the court to give their reasons for an award. To require opinions free of ambiguity may lead arbitrators to play it safe by writing no supporting opinions. This would be undesirable for a well-reasoned opinion tends to engender confidence in the integrity of the process and aids in clarifying the underlying agreement.

United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960). Here, however, we deal not with a "mere ambiguity" in Arbitrator Glazer's opinion, but rather a completely non-sensical construction. I do not believe that even the Supreme Court would wish to see such errors go uncorrected, or at the very least, unchallenged. And the Court is not entirely correct in its prediction that searching review of arbitrators' reasoning will lead them to "play it safe" by issuing summary decisions unsupported by any writing at all, *see also* Maj. Op. at 8, for any ability of arbitrators to avoid scrutiny in this way is ultimately circumscribed by the desires of the parties who select and agree to be bound by them. Losing parties will no longer agree to arbitration schemes if they are never informed in writing, at least on a basic level, *why* it is that they have lost. Furthermore, no matter how deferential an "arguably construing" test this Court wishes to apply to arbitral review cases, the test is rendered impotent if the arbitrator issues only an up-or-down decision. Our deference is not so great that we allow the arbitrator to do all the "construing" in his head only, without committing anything to writing.

My position therefore does not stray from what the Supreme Court noted in *Misco*:

> [I]n the very rare instances when an arbitrator's procedural aberrations rise to the level of affirmative misconduct, as a rule the court must not foreclose further proceedings by settling the merits according to its own judgment of the appropriate result, since this step would improperly substitute a judicial determination for the arbitrator's decision that the parties bargained for in the collective-bargaining agreement. Instead, the court should simply vacate the award, thus leaving open the possibility of further proceedings if they are permitted under the terms of the agreement. The court also has the authority to remand for further proceedings when this step seems appropriate.

484 U.S. at 40 n.10. This case presents us with such a rare instance, and I would thus vacate and remand for further proceedings. *See also Patten v. Signator Ins. Agency, Inc.*, 441 F.3d 230, 236 (4th Cir. 2006) (vacating and remanding an award because the arbitrator "simply amended or altered the agreement, and thus he acted without authority"); *Cytyc Corp. v. DEKA Products Ltd. P'Ship*, 439 F.3d 27, 34 (1st Cir. 2006) (noting that an award "unfounded in reason and fact" could properly be vacated even under the highly deferential standard of arbitrator review); *Brentwood Medical Associates v. United Mine Workers of America*, 396 F.3d 237, 242 (3d Cir. 2005) (while circuit court review of arbitration awards is limited to asking whether the parties "got what they bargained for," this includes inquiry into whether the arbitrator produced a "rational award"); *Int'l Union of Operating Eng'rs, Local 139, AFL-CIO v. J.H. Findorff &*

Son, Inc., 393 F.3d 742, 745 (7th Cir. 2004) (courts must only enforce "intellectually honest arbitral decisions").

An arbitrator who writes a ten-page opinion containing "all the hallmarks of interpretation," Maj. Op. at 7, may indeed be "arguably construing" the collective bargaining contract, but he could still be guilty of a procedural aberration by virtue of his irrational reasoning, reasoning that seriously calls into question whether or not he was acting within the scope of his authority. In other words, no matter how deferential is our review on the merits, we may still demand rational thought from the arbitrator in reaching those merits. Otherwise it strikes me as no review at all. *See Cytyc*, 439 F.3d at 32 (holding that while the "authority of a federal court to disturb an arbitration award is tightly circumscribed," such awards are not "utterly impregnable"); *Brentwood Medical*, 396 F.3d at 244 (noting that courts are "neither entitled nor encouraged to simply 'rubber stamp' the interpretations and decisions of arbitrators") (Ambro, J., dissenting).

I therefore respectfully dissent.

CONCURRING IN PART, DISSENTING IN PART

JULIA SMITH GIBBONS, Circuit Judge, with whom BATCHELDER, Circuit Judge, joins concurring in part and dissenting in part. I concur in parts I and II.A of the majority opinion. The separation of instances of "procedural aberration" from substantive review of the merits and the recognition that in rare and egregious cases the courts must find that arbitral merits decisions depart so far from the contract language as not to amount to contract construction provide useful guidance for consideration of awards. I thus do not understand the majority opinion to limit review to "procedural aberration," as the dissent seems to indicate. I

also agree with many of the majority's observations about the arbitrator's decision in Part II.B. In particular, I believe that the majority correctly characterizes the issue with respect to this award as one of substance, not procedure. I disagree, however, that application of the analytical framework outlined by the majority for reviewing the substantive merits of arbitration awards results in enforcement of this award. While certainly the text of the decision reads like the arbitrator is attempting to construe or interpret the contract, what the arbitrator in fact does is ignore the plain language of the contract limiting the parity requirement to increases funded by the federal funding source and bind the parties to past practice despite the contract's clear language to the contrary. In my view, the window dressing of nice opinion language should not obscure the absence of underpinnings for the decision. And, unlike the majority, I find it difficult to characterize silence as ambiguity. I would place this decision in the category of those so "ignor[ant]" of the contract's "plain language," *Misco*, 484 U.S. at 38, "as to make implausible any contention that the arbitrator was construing the contract." (Maj. Op. at 6.) For this reason, I would affirm the district.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 04-2564

[Filed January 26, 2007]

MICHIGAN FAMILY RESOURCES, INC. Plaintiff-Appellee,	)
v.	)
SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL NO. 517M, Defendant-Appellant.	)

On Appeal from the United States District Court
for the Western District of Michigan at Grand Rapids.

JUDGMENT

UPON CONSIDERATION of the petition for rehearing en banc and the supplemental briefs,

THIS CASE was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is REVERSED. IT IS FURTHER ORDERED that the case is REMANDED so that the district court may enter an order enforcing the arbitration award.

ENTERED BY ORDER OF THE COURT

/s/Leonard Green
Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 04-2564

[Filed January 27, 2006]

MICHIGAN FAMILY RESOURCES, INC. Plaintiff-Appellee,	)
v.	)
SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL NO. 517M, Defendant-Appellant.	)

On Appeal from the United States District Court for the Western District of Michigan at Grand Rapids. No. 04-00019–Gordon J. Quist, District Judge.

JUDGES: Before: DAUGHTREY, GILMAN, and SUTTON, Circuit Judges. SUTTON, J., delivered a separate concurring opinion.

OPINION

PER CURIAM. Local 517M of the Service Employees International Union challenges the decision of the district court to vacate an arbitration award in its favor. Because the award does not draw its essence from the collective bargaining agreement, we affirm.

I.

Michigan Family Resources (MFR) runs the federal Headstart Program that serves Kent County, which lies in western Michigan. Local 517M of the Service Employees International Union represents some of MFR's employees. On behalf of its members, the union negotiated a collective bargaining agreement with MFR that entitled its members to annual wage increases. For our purposes, the agreement contains four pertinent provisions.

Article 35(1) of the agreement provides:

> Bargaining unit members will receive the same cost of living increases paid to other MFR employees pursuant to the directive of MFR's funding source. The parties understand that the timing and amount of any such increase is entirely dictated by the funding source.

JA 43. The "funding source" mentioned in this provision, the parties agree, refers to the federal government.

Article 35(2) provides:

> During the fall semester of each program year, bargaining unit members will be reviewed and will be

> considered for a merit increase.... MFR will guarantee at least that for each bargaining unit employee the sum of any [cost-of-living increase] paid during the year and the merit increase will be as follows: 2002 - 4%; 2003 - 2.5%; 2004 - 3.5%. For example, if the [cost-of-living] increase for 2004 is 2.5%, effective on September 1, 2004 bargaining unit members will receive at least an additional 1.0%.

JA 43-44.

Article 5(c) requires the parties to arbitrate any disputes that they cannot resolve on their own. The arbitrator, it says, "shall have full authority to render a decision which shall be final and binding upon both parties and the employees, except that the arbitrator shall not have authority to change, alter, amend, or deviate from the terms of this collective bargaining agreement in any respect." JA 27. This article further provides that "if the Union requests arbitration, the parties shall choose an arbitrator by selecting from the following list through the alternating strike method:" Mario Chiesa, Mark Glazer, William Daniel, George Roumell, and Lamont Stallworth. *Id.*

And Article 34 provides that the agreement "expresses the understanding of the parties and it will not be changed, modified, or varied, except by written instrument signed by duly authorized agents of the party hereto," and that "there are no past practices which are binding upon the parties." JA 43.

In May 2003, MFR notified the union employees that they would receive a 2.5% increase for 2003-1.5% from the "funding source" (*i.e.*, the federal government), 1% from MFR-while non-union employees would receive a 4%

increase for the year. While the 2003 pay increase for union employees satisfied the collective bargaining agreement's minimum requirement for that year (2.5%), the union claimed that the agreement required parity between union and non-union employees in the payment of cost-of-living increases. The union accordingly filed a grievance against MFR. In accordance with the agreement, the parties engaged an arbitrator, Mark Glazer, to resolve the dispute.

On December 10, 2003, the arbitrator issued a written decision in favor of the union. As he saw the matter, the question was "whether Article 35 requires MFR to provide parity in [cost-of-living] payments for its [union] employees when non-Union employees receive higher [] payments." Arb. Op. at 2. On this point, the arbitrator reasoned, Article 35 was not entirely clear. While it required union members to "receive the same payments from the federal funding source as other employees," it did not directly address "the cost of living increases from other sources, such as from the Employer." *Id.* at 7. The arbitrator then noted that before and after the adoption of the collective bargaining agreement, MFR granted the same cost-of-living increase to all employees, regardless of union affiliation. *Id.* at 8. MFR never held merit reviews, he added, and in a 2002 memo (dealing with pay increases for the first year of the collective bargaining agreement) it characterized the entire wage increase to union employees as a cost-of-living increase. "I am persuaded," the arbitrator then concluded, "that [Article 35] becomes ambiguous because of the Employer's prior decision to characterize both its individual payment and its payment from the federal funding source as [cost of living]." *Id.* at 8. Having identified this ambiguity, he resolved it in light of the employer's practice of granting identical cost-of-living increases to all employees and therefore awarded union members an equivalent 4% cost-of-living increase.

On January 9, 2004, MFR filed a complaint in federal court seeking to vacate the award, premising subject-matter jurisdiction on § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. On November 10, 2004, the district court granted MFR's motion for summary judgment, holding that "the Arbitrator's award does not draw its essence from the [collective bargaining agreement] because the Arbitrator considered evidence to aid in construing the [collective bargaining agreement] when, in fact, no construction was necessary." D. Ct. Op. at 6. "The Arbitrator," the court concluded, "went beyond the express terms of the [collective bargaining agreement] by imposing additional requirements upon the parties and considering past practices, which are specifically disclaimed by the [collective bargaining agreement's] waiver provisions." *Id.* This appeal followed, which we review de novo. *Beacon Journal Publ'g Co. v. Akron Newspaper Guild*, 114 F.3d 596, 599 (6th Cir. 1997).

II.

Although the standard for reviewing arbitration awards is "one of the narrowest standards of judicial review in all of American jurisprudence," *Tenn. Valley Auth. v. Tenn. Valley Trades & Labor Council*, 184 F.3d 510, 514-15 (6th Cir. 1999) (internal quotation omitted), "our review is not toothless when an arbitrator's award disregards the collective bargaining agreement and its terms," *Beacon Journal Publ'g Co.*, 114 F.3d at 599. When an award "draws its essence from the collective bargaining agreement," we will uphold it; when it does not, we will vacate the award. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987) (internal quotation omitted). An award does not "draw its essence" from the collective bargaining agreement, we repeatedly have said, when any of the following is true: "(1) it conflicts with

express terms of the agreement; (2) it imposes additional requirements not expressly provided for in the agreement; (3) it is not rationally supported by or derived from the agreement; or (4) it is based on general considerations of fairness and equity instead of the exact terms of the agreement." *Sterling China Co. v. Glass Workers Local No. 24*, 357 F.3d 546, 556 (6th Cir. 2004) (internal quotation omitted); *see Cement Divs., Nat'l Gypsum Co. v. United Steelworkers, Local 135*, 793 F.2d 759, 766 (6th Cir. 1986).

Applying these standards, the district court determined that the arbitrator's award did not draw its essence from the collective bargaining agreement. We agree.

By its terms, Article 35(1) of the agreement addresses the requirements for government-funded cost-of-living increases, providing that "bargaining unit members will receive the same cost of living increases paid to other MFR employees pursuant to the directive of MFR's funding source." Whatever cost-of-living increase that "MFR's funding source" (the federal government) provides in a given year, in other words, must be provided equally to union and non-union members alike. But the agreement does not spell out any requirements for *employer-funded* cost-of-living increases. And Article 35(2) addresses merit increases and guarantees a minimum raise for all union employees and yet says nothing about parity between union and non-union members. Each fall, it says, "bargaining unit members will be reviewed and will be considered for a merit increase." JA 43. It then "guarantee[s] at least that for each bargaining unit employee the sum of any [cost-of-living increase] paid during the year and the merit increase will be as follows: 2002 - 4%; 2003 - 2.5%; 2004 - 3.5%." JA 43-44. According to the terms of this provision, union members are guaranteed a minimum increase each year, regardless of

what the federal government's cost-of-living increase is, while non-union members receive no such guarantee.

The terms of the two provisions, it seems to us, admit of one proper interpretation. While the agreement requires parity in government-funded cost-of-living increases, it does not require parity in employer-funded cost-of-living increases or in merit increases (an odd concept at any rate) and therefore does not require parity in the sum of the cost-of-living and merit increases. The parties reached agreement on the minimum amounts owed to union employees, but they tied that agreement to set percentages, *not* to what MFR happened to pay non-union employees in a given year. *See* Article 35(2), JA 43-44. Faced with an agreement that gives union employees the same government-funded cost-of-living increases as non-union employees and that assures union employees a minimum salary increase for each of the three years of the agreement, the arbitrator had no authority to impose an additional term on the employer, namely that *any* cost-of-living increase provided to non-union employees, no matter how funded, must be provided to union employees. When the arbitrator required parity in employer-funded salary increases, he thus imposed an "additional requirement[] not expressly provided for in the agreement," one that "conflicted with express terms of the agreement," *Sterling China Co.*, 357 F.3d at 556, and one that accordingly did not draw its essence from the agreement.

Given this clarity in the agreement, the arbitrator also had no basis for consulting evidence of the parties' custom of wage increases and no basis for invoking that custom as a source in construing the agreement. "Past practice or custom should not be used to interpret or give meaning to a provision or clause of the collective bargaining agreement that is clear and unambiguous." *Beacon Journal Publ'g Co.*, 114 F.3d at

601; *see also Allied Indus. Workers v. Gen. Elec. Co.*, 471 F.2d 751, 756-57 (6th Cir. 1973) ("Where the meaning of the clause is clear, no construction is necessary."). Disregarding this more pertinent custom, the arbitrator committed a severe order-of-operations error, reasoning that the language of Article 35 "*becomes* ambiguous" because of MFR's past salary-increase practices. JA 55 (emphasis added). Under these circumstances, the district court rightly concluded that the award did "not draw its essence from the [collective bargaining agreement] because the Arbitrator considered evidence to aid in construing the [collective bargaining agreement] when, in fact, no construction was necessary." D. Ct. Op. at 6.

In reaching this conclusion, we are not unmindful of appellant's argument that an arbitration award should not be vacated merely because the arbitrator commits a legal error in construing the collective bargaining agreement. As the concurrence points out, the argument is a compelling one and Supreme Court precedent provides some support for it. But as the concurrence also points out, this circuit's four-part test-resting in part on these same Supreme Court precedents-has been in place for 20 years and binds us here. *See Cement Divs., Nat'l Gypsum Co. v. United Steelworkers, Local 135*, 793 F.2d 759, 766 (6th Cir. 1986). If appellant is to have success on this front, in short, it will have to be through a petition for rehearing en banc, one that the three of us would be open to consider in this case or in any other case presenting the issue.

III.

For these reasons, we affirm.

CONCURRENCE

SUTTON, Circuit Judge, concurring. Nearly a half-century ago, the Supreme Court issued three watershed opinions designed to end the federal courts' hostility to labor-arbitration awards. *See United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564, 80 S. Ct. 1343, 4 L. Ed. 2d 1403 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960); *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960). In one of these decisions, the Court stated that "the refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements." *Enter. Wheel*, 363 U.S. at 596. Five years ago, the Court repeated the instruction: So long as "an arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, the fact that a court is convinced he committed serious error does not suffice to overturn his decision." *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509, 121 S. Ct. 1724, 149 L. Ed. 2d 740 (2001) (internal quotation omitted). Between these bookend rulings, the Court has frequently reminded lower courts that an arbitration award may not be vacated merely because the arbitrator failed to resolve the merits correctly. *See, e.g.*, *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987) (stating that "a court should not reject an award on the ground that the arbitrator misread the contract"); *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber Workers*, 461 U.S. 757, 764, 103 S. Ct. 2177, 76 L. Ed. 2d 298 (1983) (stating that "a federal court may not overrule an arbitrator's decision simply because the court believes its own

interpretation of the contract would be a better one" and that a court is "not entitled to review the merits of the contract dispute").

When an employer and union agree to submit questions of contract interpretation to an arbitrator, our "limited" function thus is to "ascertain[] whether the party seeking arbitration is making a claim which on its face is governed by the contract." *Am. Mfg. Co.*, 363 U.S. at 567-68. If the contract makes the dispute an arbitrable one, "the courts... have no business...determining whether there is particular language in the written instrument which will support the claim." *Id.* at 568. Unless "procured by the parties through fraud or through the arbitrator's dishonesty," *Misco*, 484 U.S. at 38, or unless the arbitrator merely has "dispensed his own brand of industrial justice," *Enter. Wheel*, 363 U.S. at 597, an arbitrator's award premised on his construction of the contract permissibly "draws its essence from the collective bargaining agreement" and should be upheld, *id.*

This near-absolute deference to the decision of the arbitrator respects the mutual benefit of the parties' bargain. "It is the arbitrator's construction," not the federal courts' construction, after all, that "was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." *Id.* at 599; *see Misco*, 484 U.S. at 37-38 ("Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept."). "Regardless of what our view might be of the correctness of [the arbitrator's] contractual interpretation, the Company and the Union bargained for that interpretation," *W.R. Grace*, 461 U.S. at 765-and that interpretation must be

upheld even if time and further review show that the parties in the end have bargained for nothing more than error.

While we have called this standard of review "one of the narrowest standards of judicial review in all of American jurisprudence," *see, e.g.*, *Way Bakery v. Truck Drivers Local No. 164*, 363 F.3d 590, 593 (6th Cir. 2004) (internal quotation omitted), I can think of none narrower. Consider the spectrum of standards applied by federal appellate courts, whether reviewing the work of federal juries, federal district courts, federal and state executive-branch agencies, state courts (through habeas corpus review) or federal and state legislative bodies (through judicial review). Federal-court review of arbitration awards of course has no parallel to the dice-loading skepticism of strict and intermediate scrutiny or the fresh review that characterizes the de novo standard. So long as the "function" of a reviewing court is "confined...to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract," *Am. Mfg. Co.*, 363 U.S. at 568, and so long as we must tolerate even"serious" legal and factual errors committed by arbitrators who were "arguably construing...the contract," *Garvey*, 532 U.S. at 509, I should think it difficult to identify a standard of review that requires more federal-court modesty than this one. Plain error, clear error, abuse of discretion, *Chevron* deference, AEDPA deference, substantial evidence and reasonableness all would seem to have more teeth than federal-court review of arbitration awards. In each setting, the standard asks more of the body under review than simply whether they were "arguably" performing their job. Even rational-basis review demands more than whether the legislature "arguably" was legislating. It may be true that the federal courts have developed "more verbal formulas for the scope of appellate review...than there are distinctions actually capable of being drawn in the practice of appellate review." *United States v.*

Boyd, 55 F.3d 239, 242 (7th Cir. 1995). But no matter what the relative toothlessness of arbitration review happens to be in relation to these other deferential forms of review, the "verbal formula" given to us by the Supreme Court is one that demands we respect in word and deed the delegation of decision-making authority chosen by the contracting parties.

If we are to take seriously what the Supreme Court has said in this area and what it has done (to my knowledge it has not authorized the vacation of a labor-arbitration award since 1960), I do not understand how we can alter the parties' delegation of decision-making authority in this case merely because one of those parties (the employer) now thinks that the arbitrator botched the interpretation of the contract. At most, the employer has shown that the arbitrator misapprehended the meaning of the contract and misapprehended the rules for construing contracts. As the district court rightly reasoned and as our per curiam opinion correctly agrees, the collective bargaining agreement required parity only as to cost-of-living increases from the federal government, said nothing about employer-funded cost-of-living increases and established the minimum increases that union employees could expect in a given year, increases tied in no way to the increases given to non-union employees. Read together, the provision of limited parity requirements and the provision of express minimum-salary requirements for union employees strongly imply the exclusion of an overarching parity requirement between union and non-union employees. And that implication is strong enough that the arbitrator should not have pinned his interpretation of the contract on the parties' practices in implementing it. If a district court in a diversity case had interpreted the contract in this manner, no one would doubt that we should correct the error.

But that of course is not the point. An arbitrator selected by the parties, not a federal district court judge, interpreted this contract, and that makes all the difference. We have here none of the tell-tale signs for vacating an award: bias by the arbitrator, a conflict of interest, a transparent effort to "dispense his own brand of industrial justice," or a dispute that is not arbitrable. Instead we have an arbitrator who certainly was "arguably construing" the contract and who just as certainly made a "serious error" in construing the contract, a confluence of circumstances that does not invest us with authority to "overturn [the] decision." *Garvey*, 532 U.S. at 509. Throughout his ten-page opinion, the arbitrator references, quotes and analyzes the contract. Even the flaw in his analysis does not disprove that he was attempting to construe the contract. "The above language," he says, "becomes ambiguous because of the Employer's prior decision to characterize both its individual payment and its payment from the federal funding source as [a cost-of-living increase]." Arb. Op. at 8. Whether the "becomes" phrase was a slip of the pen or a slip in thought, it was still "the above language"-the contract language-that he was trying to figure out. Even the district court characterized these efforts as construction: "The Arbitrator considered evidence to aid *in construing* the [agreement] when, in fact, no construction was necessary." D. Ct. Op. at 6 (emphasis added). All that happened here is that the arbitrator committed a legal error, a serious legal error to be sure, but an error of interpretation nonetheless, which does not authorize us to vacate the award.

What makes this case difficult is not figuring out what the contract means and it is not applying the Supreme Court's directives in this area; it is faithfully applying our circuit's four-part test for determining whether to vacate an arbitration award. Twenty years ago, the court attempted to summarize the four settings in which the circuit had vacated an award

because it failed to "draw[] its essence" (*Enter. Wheel*, 363 U.S. at 597) from the contract:

> An award fails to derive its essence from the agreement when (1) an award conflicts with express terms of the collective bargaining agreement, *see, e.g., Grand Rapids Die Casting Corp. v. Local Union No. 159, U.A.W.*, 684 F.2d 413 (6th Cir. 1982); (2) an award imposes additional requirements that are not expressly provided in the agreement, *see, e.g., Sears, Roebuck & Co. v. Teamsters Local Union No. 243*, 683 F.2d 154 (6th Cir. 1982)...; (3) an award is without rational support or cannot be rationally derived from the terms of the agreement, *see, e.g., Timken Co. v. United Steelworkers of America*, 482 F.2d 1012 (6th Cir. 1973); and (4) an award is based on general considerations of fairness and equity instead of the precise terms of the agreement, *see, e.g., Local 342, United Auto Workers v. T.R.W., Inc.*, 402 F.2d 727 (6th Cir. 1968).

Cement Divs., Nat'l Gypsum Co. v. United Steelworkers, Local 135, 793 F.2d 759, 766 (6th Cir. 1986). If a dissatisfied party to an arbitration can satisfy any one of these tests, we have held, the award should be vacated. *Wyandot, Inc. v. Local 227, United Food & Commercial Workers Union*, 205 F.3d 922, 929 n.3 (6th Cir. 2000). And in each decade since our decision in *Cement Divisions*, we have consistently applied this four-part test. *See, e.g., Appalachian Reg'l Healthcare, Inc. v. United Steelworkers, Local 14398*, 245 F.3d 601, 604-05 (6th Cir. 2001); *Kuhlman Elec. Corp. v. Int'l Union, UAW*, 144 F.3d 898, 902 (6th Cir. 1998); *Beacon Journal Publ'g Co. v. Akron Newspaper Guild, Local No. 7*, 114 F.3d 596, 600 (6th Cir. 1997); *Dallas & Mavis Forwarding Co. v. Gen. Drivers, Local No. 89*, 972 F.2d

129, 134 (6th Cir. 1992); *Dobbs, Inc. v. Local No. 614, Int'l Bhd. of Teamsters*, 813 F.2d 85, 86 (6th Cir. 1987).

This formulation, I respectfully believe, has made it easier to vacate an arbitration award on the merits than the Supreme Court meant it to be. The Supreme Court itself has told us when an arbitration award "draws its essence" from a contract. The same Court decision that gave us the "draws its essence" language, *Enter. Wheel*, 363 U.S. at 597, gave us this language ("the proper approach to arbitration under collective bargaining agreements" is to "refuse . . . to review the merits of an arbitration award," *id.* at 596) and gave us just one illustration of when an award may be vacated on the merits (when the arbitrator has "dispensed his own brand of industrial justice," *id.* at 597). Since then, barring "fraud" or the "arbitrator's dishonesty," *Misco*, 484 U.S. at 38, the Court has said that federal courts should uphold arbitration awards so long as the arbitrator is "arguably construing" the contract, even when that construction results in a "serious error," *Garvey*, 532 U.S. at 509. In view of the Court's many descriptions of this standard, I am not sure it helps matters to add our own gloss to it, and still less to do so through a four-part test that can be satisfied if any one of its formulations can be met.

Nor is it clear to me how the first two parts of our test-(1) whether the award conflicts with "express terms" of the agreement or (2) whether the award "imposes additional requirements that are not expressly provided in the agreement"-can be reconciled with Supreme Court precedent. Whether an award conflicts with the "express terms" of the contract or "imposes additional requirements" not provided in the contract, to begin with, are two sides of the same coin. And both sides of that coin seem to be in tension with *Garvey's* directive that a "serious error" in interpreting a

contract does not provide an independent ground for vacating an arbitration award so long as the arbitrator was "arguably construing" the contract. 532 U.S. at 509. After all, when will it not be the case that a losing party to an arbitration can characterize a "serious" legal error in construing a contract as an award that conflicts with "express terms" of the contract (or "imposes additional requirements" not provided in the contract)? Only an exceedingly unimaginative attorney would shy away from that argument. And from a court's perspective, what exactly is the difference between making a "serious" legal error in construing a contract and "imposing an additional requirement" not provided in the contract? The distinction is lost on me. I would prefer to focus on the "serious error"/"arguably construing" language of the Court, and go one step further-say that close cases should be resolved in favor of the presumption that the arbitrator was "arguably construing" the contract. *See Ethyl Corp. v. United Steelworkers*, 768 F.2d 180, 187 (7th Cir. 1985) ("We have gone on at such length because we want to make clear that we take seriously the twin propositions that (1) the reviewing court's function (whether the district court's, or this court's) is at an end when it concludes that what the arbitrator did was interpretation of the contract, and (2) when in doubt the court must find that it was interpretation."). No doubt, this view will permit only the most egregious awards to be vacated. But it is a view that seems consistent with the parties' bargain and one whose flaws at any rate can be corrected by the remedy of choosing better arbitrators.

What started as a rule requiring the courts to "refuse to review the merits of an arbitration award" and to tolerate "serious" legal errors as long as the arbitrator is "arguably construing" the contract became a rule focused only on whether an award in the abstract "draws its essence from the collective bargaining agreement" and turned into a rule that

an award may be vacated if it conflicts with the "express terms" of the agreement. Not unlike the children's game of "telephone," the current message differs from the original message-and indeed may well convey the opposite message. One cannot, in short, respect the requirement that we vacate arbitration awards that do not follow the "express terms" of the agreement without slighting the requirement that we tolerate "serious" legal errors in arbitration awards.

The problem, moreover, is not simply one of language. Repeated incantations of our test seem to have led us to vacate a surprising number of arbitration awards. While the Supreme Court to my knowledge has not vacated a single labor-arbitration award since 1960, my chambers' survey of published Sixth Circuit decisions since 1986 reveals that we have vacated 29% (10 out of 34) of labor-arbitration awards that we have reviewed on merits-based grounds. *See* Appendix. The pattern does not change when one looks at unpublished opinions, as we have vacated 25% of those awards (19 out of 75) on similar grounds. *See id.* And all of this has happened at the same time that the Supreme Court has said that "courts will set aside the arbitrator's interpretation of what their agreement means only in rare instances." *E. Associated Coal Corp. v. United Mine Workers, Dist. 17*, 531 U.S. 57, 62, 121 S. Ct. 462, 148 L. Ed. 2d 354 (2000). Who among the practicing bar would not appeal an award that has a one-in-four chance of winning?

These statistics have not escaped the notice of arbitration scholars. Referring to our *Cement Divisions* test, one author commented that "the Sixth Circuit's...variant of the essence construct sweeps away all pretense of judicial deference to the contract interpretation and application decisions of the arbitrator." Stephen L. Hayford, *Unification of the Law of Labor Arbitration and Commercial Arbitration: An Idea*

Whose Time Has Come, 52 Baylor L. Rev. 781, 821 (2000). Another scholar discussed the test, then noted that "the courts which follow the rule of the First, Fifth, and Sixth Circuits are saying that it is for the court, not the arbitrator, to decide what the express terms mean." David E. Feller, *Taft and Hartley Vindicated: The Curious History of Review of Labor Arbitration Awards*, 19 Berkeley J. Emp. & Lab. L. 296, 303 (1998). Still another discussed the test, then concluded that "the Sixth Circuit serves as an example of the circuits' attempted end run around the Supreme Court's rulings." Anna Knull, Recent Developments, American Eagle Airlines, Inc. v. Air Line Pilots Ass'n, Int'l: *The Fifth Circuit Dispenses Its Own Brand of Justice in Reviewing a Labor Arbitration Award*, 78 Tul. L. Rev. 2305, 2308 (2004). *See also* Feller, *Taft and Hartley Vindicated*, 19 Berkeley J. Emp. & Lab. L. at 302 ("One man's essence may be another man's (or a court's) nonsense!").

At some point, it seems to me, the full court should reconsider the Supreme Court's directives in this area or at least explain how our four-part test respects them. That seems particularly imperative since we have many cases that spell out the four-part test, then proceed to recite and follow the Supreme Court's more deferential language. *See, e.g.*, *Way Bakery*, 363 F.3d at 593 (referring to four-part test and reciting that we should uphold arbitration awards even when they contain a "serious" legal error); *Tenn. Valley Authority v. Tenn. Valley Trades & Labor Council*, 184 F.3d 510, 515 (6th Cir. 1999) (same); *Bruce Hardwood Floors v. S. Council of Indus. Workers*, 8 F.3d 1104, 1107 (6th Cir. 1993) (same). Because we continue to refer to both this deferential and non-deferential language in our cases, one could perhaps say that this is all simply a matter of emphasis, a "you like potato, I like potato" problem. Maybe so. But in view of the nearly 27% vacation rate in our labor-arbitration cases, our holdings

show that the four-part test has been anything but deferential in application. Because I am bound by our four-part test and our practice in applying it, I feel obliged to concur in the decision vacating this arbitration award-even though this case strikes me as presenting precisely the kind of "serious error" that the Supreme Court has expected we would permit arbitrators to make.

APPENDIX

Published Opinions/Upholding Awards

Int'l Bhd. of Elec. Workers, Local 1842 v. Cincinnati Elecs. Corp., 808 F.2d 1201 (6th Cir. 1987) (reviewing arbitrator's interpretation of a forfeiture provision and holding that the award drew its essence from the agreement).

Eberhard Foods, Inc. v. Handy, 868 F.2d 890 (6th Cir. 1989) (reviewing arbitrator's interpretation of a just-cause provision and holding that the award drew its essence from the agreement).

Hawks v. City of Pontiac, 874 F.2d 347 (6th Cir. 1989) (reviewing arbitrator's interpretation of promotion provision and holding that the award drew its essence from the agreement).

Local 120, Int'l Molders & Allied Workers Union v. Brooks Foundry, Inc., 892 F.2d 1283 (6th Cir. 1990) (reviewing arbitrator's interpretation of two remedial provisions and holding that the award drew its essence from the agreement).

Dixie Warehouse & Cartage Co. v. Gen. Drivers, Local Union No. 89, 898 F.2d 507 (6th Cir. 1990) (reviewing

arbitrator's interpretation of a discharge provision and holding that the award drew its essence from the agreement).

Vic Wertz Distrib. Co. v. Teamsters Local 1038, 898 F.2d 1136 (6th Cir. 1990) (reviewing arbitrator's interpretation of vacation and grievance provisions and holding that the award drew its essence from the agreement).

Interstate Brands Corp. v. Chauffeurs Local Union No. 135, 909 F.2d 885 (6th Cir. 1990) (reviewing arbitrator's interpretation of just-cause and grievance provisions and holding that the award drew its essence from the agreement).

Lattimer-Stevens Co. v. United Steelworkers, Sub-Dist. 5, 913 F.2d 1166 (6th Cir. 1990) (reviewing arbitrator's interpretation of a longevity provision and holding that the award drew its essence from the agreement).

Dallas & Mavis Forwarding Co. v. Gen. Drivers, Local Union No. 89, 972 F.2d 129 (6th Cir. 1992) (reviewing arbitrator's interpretation of "cancelled by the shipper" provision and holding that the award drew its essence from the agreement).

Action Distrib. Co. v. Int'l Bhd. of Teamsters Local 1038, 977 F.2d 1021 (6th Cir. 1992) (reviewing arbitrator's interpretation of employee-transfer provisions and holding that the award drew its essence from the agreement).

Monroe Auto Equip. Co. v. Int'l Union, UAW, Monroe Equip. Co., Unit of Local 878, 981 F.2d 261 (6th Cir. 1992) (reviewing arbitrator's interpretation of "under the influence in a detectable manner" provision and holding that the award drew its essence from the agreement).

Bruce Hardwood Floors v. S. Council of Indus. Workers, 8 F.3d 1104 (6th Cir. 1993) (reviewing arbitrator's interpretation of discharge provisions and holding that the award drew its essence from the agreement).

Mercy Mem'l Hosp. Corp. v. Hosp. Employees' Div. of Local 79, 23 F.3d 1080 (6th Cir. 1994) (reviewing arbitrator's interpretation of a just-cause provision and holding that the award drew its essence from the agreement).

Kuhlman Elec. Corp. v. Int'l Union, UAW, 144 F.3d 898 (6th Cir. 1998) (reviewing arbitrator's interpretation of a provision requiring the employer to add jobs and holding that the award drew its essence from the agreement).

Int'l Ass'n of Machinists & Aerospace Workers v. Tenn. Valley Auth., 155 F.3d 767 (6th Cir. 1998) (reviewing arbitrator's interpretation of outsourcing provision and holding that the award drew its essence from the agreement).

AK Steel Corp. v. United Steelworkers, 163 F.3d 403 (6th Cir. 1998) (reviewing arbitrator's interpretation of a neutrality agreement and holding that the award drew its essence from the agreement).

Tenn. Valley Auth. v. Tenn. Valley Trades & Labor Council, 184 F.3d 510 (6th Cir. 1999) (reviewing arbitrator's interpretation of discharge provisions and holding that the award drew its essence from the agreement).

Gen. Truck Drivers, Local No. 957 v. Dayton Newspapers, Inc., 190 F.3d 434 (6th Cir. 1999) (reviewing arbitrator's interpretation of discharge provisions and holding that the award drew its essence from the agreement).

DBM Techs., Inc. v. Local 227, United Food & Commercial Workers Int'l Union, 257 F.3d 651 (6th Cir. 2001) (reviewing arbitrator's interpretation of medical-leave provisions and holding that the award drew its essence from the agreement).

Int'l Bhd. of Teamsters, Local Union No. 1224 v. ABX Air, Inc., 274 F.3d 1023 (6th Cir. 2001) (reviewing arbitrator's interpretation of random-search provision and holding that the award drew its essence from the agreement).

Detroit Typographical Union, Local 18 v. Detroit Newspaper Agency, 283 F.3d 779 (6th Cir. 2002) (reviewing arbitrator's interpretation of job-guarantee provisions and holding that the award drew its essence from the agreement).

Int'l Bhd. of Teamsters, Local 519 v. United Parcel Serv., Inc., 335 F.3d 497 (6th Cir. 2003) (reviewing arbitrator's interpretation of a cardinal-infractions list and holding that the award drew its essence from the agreement).

Sterling China Co. v. Glass Workers Local 24, 357 F.3d 546 (6th Cir. 2004) (reviewing arbitrator's interpretation of compensation provisions and holding that the award drew its essence from the agreement).

Way Bakery v. Truck Drivers Local No. 164, 363 F.3d 590 (6th Cir. 2004) (reviewing arbitrator's interpretation of discharge provisions and holding that the award drew its essence from the agreement).

Published Opinions/Vacating Awards

Dobbs, Inc. v. Local No. 614, Int'l Bhd. of Teamsters, 813 F.2d 85 (6th Cir. 1987) (reviewing arbitrator's interpretation of the term "offense" and holding that the award-which

defined offense to mean only violations for which punishment was imposed-did not draw its essence from the agreement).

Int'l Bhd. of Elec. Workers, Local 429 v. Toshiba Am., Inc., 879 F.2d 208 (6th Cir. 1989) (reviewing arbitrator's interpretation of a provision subjecting employees to immediate discharge for engaging in strikes and holding that the award-which reinstated employees based on the employer's oral agreement-did not draw its essence from the agreement).

AP Parts Co. v. Int'l Union, UAW, 923 F.2d 488 (6th Cir. 1991) (reviewing arbitrator's interpretation of the interrelationship of two contracts and holding that the award-which relied on the prior contract instead of the later contract-did not draw its essence from the correct agreement).

Ohio Edison Co. v. Ohio Edison Joint Council, 947 F.2d 786 (6th Cir. 1991) (reviewing arbitrator's interpretation of a last-chance agreement and holding that the award-which did not enforce the agreement and thus failed to follow a Sixth Circuit opinion that held such agreements were enforceable-did not draw its essence from the agreement).

Int'l Ass'n of Machinists & Aerospace Workers, Local Lodge No. 2770 v. Lourdes Hosp., Inc., 958 F.2d 154 (6th Cir. 1992) (reviewing arbitrator's interpretation of scheduling provisions and holding that the award-which required the employer to notify employees of scheduling changes-did not draw its essence from the agreement).

Ficks Reed Co. v. Local Union 112 of the Int'l Union, 965 F.2d 123 (6th Cir. 1992) (reviewing arbitrator's interpretation of a collective bargaining agreement and a strike-replacements agreement and holding that the award-which unduly relied on

the collective bargaining agreement-did not draw its essence from the agreements).

Beacon Journal Publ'g Co. v. Akron Newspaper Guild, Local No. 7, 114 F.3d 596 (6th Cir. 1997) (reviewing arbitrator's interpretation of vacation provisions and holding that the award-which imposed additional requirements not expressly stated in the contract-did not draw its essence from the agreement).

Int'l Bhd. of Elec. Workers, Local 175 v. Thomas & Betts Corp., 182 F.3d 469 (6th Cir. 1999) (reviewing arbitrator's interpretation of voluntary-quit provision and holding that the award-which imposed additional terms not expressly found in the contract-did not draw its essence from the agreement).

Wyandot, Inc. v. Local 227, United Food & Commercial Workers Union, 205 F.3d 922 (6th Cir. 2000) (reviewing arbitrator's interpretation of grievance provisions and holding that the award-which failed strictly to apply the time-limit provisions of the contract-did not draw its essence from the agreement).

Appalachian Reg'l Healthcare, Inc. v. United Steelworkers, Local 14398, 245 F.3d 601 (6th Cir. 2001) (reviewing arbitrator's interpretation of the employer's right to fix hours and holding that the award-which failed to respect management's practice of using part-time employees-did not draw its essence from the agreement).

Unpublished Opinions/Upholding Awards

Premium Bldg. Prods. Co. v. United Steelworkers, Local Union No. 8869, 1986 U.S. App. LEXIS 27197, No. 85-3749, 1986 WL 17284 (6th ir. July 15, 1986) (reviewing

arbitrator's interpretation of just-cause provisions and holding that the award drew its essence from the agreement).

S. Labor Union, Local 295 v. Gatliff Coal Co., 1987 U.S. App. LEXIS 3065, Nos. 86-5136, 86-5173, 1987 WL 36692 (6th Cir. Mar. 6, 1987) (reviewing arbitrator's interpretation of a subcontracting provision and holding that the award drew its essence from the agreement).

Mastrobuono v. Local Union No. 673, Int'l Bhd. of Elec. Workers, 828 F.2d 19, 1987 WL 44583 (6th Cir. 1987) (reviewing arbitrator's interpretation of job-referral provisions and holding that the award drew its essence from the agreement).

United Food & Commercial Workers Local No. 1099 v. Kroger Co., 837 F.2d 477, 1988 WL 4459 (6th Cir. 1988) (reviewing arbitrator's interpretation of just-cause provisions and holding that the award drew its essence from the agreement).

Armco, Inc. v. Armco Employees Indep. Fed'n, Inc., 842 F.2d 330, 1988 WL 24948 (6th Cir. 1988) (reviewing arbitrator's application of a provision that the parties had not argued was applicable and holding that the award drew its essence from the agreement).

Gen. Foods Corp. v. United Cereal Workers, Local 374, 848 F.2d 190, 1988 WL 54838 (6th Cir. 1988) (reviewing arbitrator's interpretation of the word "plant" and holding that the award drew its essence from the agreement).

Adamo v. Hotel Workers Union Local 24, 861 F.2d 719, 1988 WL 116875 (6th Cir. 1988) (reviewing arbitrator's resolution

of an employment dispute and holding that the award reflected due consideration and should not be vacated).

Joseph & Feiss Co. v. Amalgamated Clothing & Textile Workers Union, 861 F.2d 720, 1988 WL 118049 (6th Cir. 1988) (reviewing arbitrator's interpretation of discharge provisions and holding that the award drew its essence from the agreement).

Borman's Inc. v. United Food & Commercial Workers Int'l Union, Local 876, 863 F.2d 47, 1988 WL 123727 (6th Cir. 1988) (reviewing arbitrator's interpretation of just-cause provisions and holding that the award drew its essence from the agreement).

Agipcoal USA, Inc. v. Int'l Union, UMWA, 877 F.2d 62, 1989 WL 66484 (6th Cir. 1989) (reviewing arbitrator's interpretation of grievance provisions and holding that the award drew its essence from the agreement).

Dist. 30, United Mine Workers v. Agipcoal USA, Inc., 889 F.2d 1087, 1989 WL 142066 (6th Cir. 1989) (reviewing arbitrator's interpretation of the term "customarily" and holding that the award drew its essence from the agreement).

Monsanto Co. v. Local Union No. 229, 893 F.2d 1335, 1990 WL 3490 (6th Cir. 1990) (reviewing arbitrator's interpretation of just-cause provisions and holding that the award drew its essence from the agreement).

Int'l Union, UAW Local No. 12 v. Sharon Mfg. Co., 895 F.2d 1413, 1990 WL 8722 (6th Cir. 1990) (reviewing arbitrator's choice of remedies and holding that the award drew its essence from the agreement).

Parke-Davis Div., Warner Lambert Co. v. Local 7-176 Oil Workers, 904 F.2d 708, 1990 WL 78183 (6th Cir. 1990) (reviewing arbitrator's interpretation of discharge provisions and holding that the award drew its essence from the agreement).

Gen. Drivers, Local Union No. 89 v. Peyton's, 1991 U.S. App. LEXIS 3223, No. 89-6496, 1991 WL 23530 (6th Cir. Feb. 25, 1991) (reviewing arbitrator's interpretation of leave-of-absence and seniority provisions and holding that the award drew its essence from the agreement).

Worthams v. Bd. of Educ. of Memphis City Sch., 1991 U.S. App. LEXIS 15042, No. 90-5936, 1991 WL 119266 (6th Cir. July 1, 1991) (reviewing arbitrator's interpretation of grievance provisions and holding that the award drew its essence from the agreement).

Grimm v. Copperweld Steel Co., 1992 U.S. App. LEXIS 3467, No. 91-3657, 1992 WL 34368 (6th Cir. Feb. 25, 1992) (reviewing arbitrator's interpretation of just-cause provisions and holding that the award drew its essence from the agreement).

Freeman Constr. Co. v. Structural Iron Workers' Local No. 17, 1992 U.S. App. LEXIS 5472, No. 91-3455, 1992 WL 56751 (6th Cir. Mar. 23, 1992) (reviewing arbitrator's interpretation of the scope of the contract and holding that the award drew its essence from the agreement).

Louisville Graphic Commc'ns, Local N-619 v. Standard Gravure Corp., 1992 U.S. App. LEXIS 7144, No. 91-5976, 1992 WL 70167 (6th Cir. Apr. 7, 1992) (reviewing arbitrator's interpretation of the phrase "temporary

suspension" and holding that the award drew its essence from the agreement).

Local 3-689 Oil Workers Int'l Union v. Martin Marietta Energy Sys., Inc., 1992 U.S. App. LEXIS 10817, No. 91-3598, 1992 WL 92732 (6th Cir. May 5, 1992) (holding, on basis of an unpublished district court opinion, that arbitrator's award drew its essence from the agreement).

Anderson v. UAW Local 36, 1992 U.S. App. LEXIS 28772, Nos. 91-2099, 91-1973, 1992 WL 315080 (6th Cir. Oct. 30, 1992) (reviewing arbitrator's interpretation of contracting-out provisions and holding that the award drew its essence from the agreement).

Bruno v. United Steelworkers, 1993 U.S. App. LEXIS 498, No. 92-3342, 1993 WL 2300 (6th Cir. Jan. 6, 1993) (reviewing arbitrator's interpretation of suspension provisions and holding that the award drew its essence from the agreement).

Quaker Oats Co. v. Int'l Chem. Workers Union, 1993 U.S. App. LEXIS 3513, No. 92-5070, 1993 WL 47199 (6th Cir. Feb. 23, 1993) (reviewing arbitrator's interpretation of severance-pay provisions and holding that the award drew its essence from the agreement).

Kar Nut Prods. Co. v. Int'l Bhd. of Teamsters, Local 337, 1993 U.S. App. LEXIS 20577, No. 92-2084, 1993 WL 304467 (6th Cir. Aug. 10, 1993) (reviewing arbitrator's interpretation of settlement, management-rights and just-cause provisions and holding that the award drew its essence from the agreement).

Ginn v. WR Southfield Assocs., 1993 U.S. App. LEXIS 22844, No. 92-2251, 1993 WL 339705 (6th Cir. Sept. 1, 1993) (reviewing arbitrator's interpretation of scheduling, seniority and just-cause provisions and holding that the award drew its essence from the agreement).

Detroit Newspaper Agency v. Newspaper Drivers & Handlers, Teamsters Local No. 372, 1994 U.S. App. LEXIS 37210, No. 93-2036, 1994 WL 714343 (6th Cir. Dec. 22, 1994) (reviewing arbitrator's interpretation of a provision that required the employer to assign certain work to a class of employees and holding that the award drew its essence from the agreement).

Int'l Bhd. of Teamsters v. Executive Jet Aviation, Inc., No. 94-3402, 1995 WL 256307 (6th Cir. May 1, 1995) (reviewing arbitrator's interpretation of discharge provisions and holding that the award drew its essence from the agreement).

Int'l Union of Operating Eng'rs, Local 369 v. Office & Prof'l Employees Union, Local 367, 1995 U.S. App. LEXIS 36178, No. 94-5786, 1995 WL 538537 (6th Cir. Sept. 7, 1995) (reviewing arbitrator's interpretation of a bargaining-unit-membership provision and holding that the award drew its essence from the agreement).

Cleo Inc. v. United Paperworkers Int'l Union, Local Union 1766, 1995 U.S. App. LEXIS 37058, No. 94-6441, 1995 WL 704191 (6th Cir. Nov. 29, 1995) (reviewing arbitrator's interpretation of a provision making arbitration awards final and binding and holding that the award drew its essence from the agreement).

Newspaper Drivers & Handlers' Local Union No. 372 v. Detroit Newspaper Agency, 1996 U.S. App. LEXIS 30400,

No. 95-2025, 1996 WL 673476 (6th Cir. Nov. 20, 1996) (reviewing arbitrator's interpretation of a provision governing the employer's negotiation with individual employees and holding that the award drew its essence from the agreement).

Hoover Co. v. Local 1985, Int'l Bhd. of Elec. Workers, 1996 U.S. App. LEXIS 33957, No. 95-4125, 1996 WL 742299 (6th Cir. Dec. 27, 1996) (reviewing arbitrator's interpretation of an unexcused-absence provision and holding that the award drew its essence from the agreement).

GTE North, Inc. v. Int'l Bhd. Elec. Workers, Local 986, 1997 U.S. App. LEXIS 13801, No. 96-3471, 1997 WL 307172 (6th Cir. June 6, 1997) (reviewing arbitrator's interpretation of temporary-employee provisions and holding that the award drew its essence from the agreement).

AK Steel Corp. v. United Steelworkers, 1997 U.S. App. LEXIS 29070, No. 96-6727, 1997 WL 650841 (6th Cir. Oct. 17, 1997) (reviewing arbitrator's interpretation of various dispute-resolution agreements and holding that the award drew its essence from the agreements).

Smith v. Westlake PVC Corp., 1997 U.S. App. LEXIS 34536, No. 96-6550, 1997 WL 764489 (6th Cir. Dec. 3, 1997) (reviewing arbitrator's interpretation of penalty provisions and holding that the award drew its essence from the agreement).

Local 2352 Amalgamated Clothing & Textile Workers Union v. Findlay Indus., Inc., 1998 U.S. App. LEXIS 15402, Nos. 96-4377, 97-3229, 97-3402, 1998 WL 415998 (6th Cir. July 7, 1998) (reviewing arbitrator's interpretation of incentive-pay provisions and holding that the award drew its essence from the agreement).

Gen. Teamsters Sales & Serv. & Indus. Union Local No. 654 v. Active Transp. Co., 1999 U.S. App. LEXIS 528, No. 97-4010, 1999 WL 68674 (6th Cir. Jan. 12, 1999) (reviewing arbitrator's interpretation of the contract to determine whether the employer could transfer work and holding that the award drew its essence from the agreement).

Dayton Newspapers, Inc. v. Int'l Bhd. of Teamsters, Local 957, 1999 U.S. App. LEXIS 9144, No. 98-3682, 1999 WL 357753 (6th Cir. May 11, 1999) (reviewing arbitrator's interpretation of discharge provisions and holding that the award drew its essence from the agreement).

Witco Corp. v. Oil Workers Int'l Union, 1999 U.S. App. LEXIS 17986, No. 98-5652, 1999 WL 591418 (6th Cir. July 28, 1999) (reviewing arbitrator's interpretation of discharge provisions and holding that the award drew its essence from the agreement).

Paulstra CRC Corp. v. United Steelworkers, Local 49, 1999 U.S. App. LEXIS 23305, No. 98-1688, 1999 WL 777350 (6th Cir. Sept. 21, 1999) (reviewing arbitrator's interpretation of discharge provisions and holding that the award drew its essence from the agreement).

Mead Corp. v. United Paperworkers Int'l Union, 1999 U.S. App. LEXIS 30155, No. 98-4242, 1999 WL 1073684 (6th Cir. Nov. 16, 1999) (reviewing arbitrator's interpretation of management-rights provisions and holding that the award drew its essence from the agreement).

Ormet Primary Aluminum Corp. v. United Steelworkers, Local 5724, 2000 U.S. App. LEXIS 38645, No. 99-3388, 2000 WL 377044 (6th Cir. Apr. 6, 2000) (reviewing

arbitrator's interpretation of a contracting-out provision and holding that the award drew its essence from the agreement).

Allied Mech. Servs., Inc. v. Local 337 of the United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus., 2000 U.S. App. LEXIS 15723, No. 99-1494, 2000 WL 924594 (6th Cir. June 26, 2000) (reviewing arbitrator's decision that the contract did not provide for job-targeting funds and holding that the award drew its essence from the agreement).

Serv. Welding v. Int'l Bhd. Boilermakers, 2000 U.S. App. LEXIS 15970, No. 99-5534, 2000 WL 977340 (6th Cir. July 5, 2000) (reviewing arbitrator's interpretation of a just-cause provision and holding that the award drew its essence from the agreement).

Great Lakes Reg'l Indus. Council of Carpenters v. Overhead Door Corp., 2000 U.S. App. LEXIS 17577, No. 99-3467, 2000 WL 1033052 (6th Cir. July 19, 2000) (reviewing arbitrator's interpretation of grievance provisions and holding that the award drew its essence from the agreement).

Eaton Corp. v. Paper Workers Int'l Union, Local 5-334, 9 Fed. Appx. 310, 2001 WL 427782 (6th Cir. 2001) (reviewing arbitrator's interpretation of just-cause provisions and holding that the award drew its essence from the agreement).

Pace Local Union 1967 v. Champion Int'l Corp., 8 Fed. Appx. 404, 2001 WL 427767 (6th Cir. 2001) (reviewing arbitrator's reversal of a prior award on the basis of the contract and holding that the new award drew its essence from the agreement).

Hoover Co. v. Local 1985, Int'l Bhd. of Elec. Workers, 22 Fed. Appx. 470, 2001 WL 1356149 (6th Cir. 2001) (reviewing arbitrator's interpretation of grievance provisions and holding that the award drew its essence from the agreement).

United Paperworkers Int'l Union, Local 1737 v. Inland Paperboard & Packaging, Inc., 25 Fed. Appx. 316, 2001 WL 1667288 (6th Cir. 2001) (reviewing arbitrator's interpretation of leave-of-absence and overtime provisions and holding that the award drew its essence from the agreement).

Dixie Warehouse & Cartage Co. v. Gen. Drivers, Local Union No. 89, 35 Fed. Appx. 169, 2002 WL 927028 (6th Cir. May 7, 2002) (reviewing arbitrator's interpretation of seniority provisions and holding that the award drew its essence from the agreement).

Ohio Valley Coal Co. v. Pleasant Ridge Synfuels, LLC, 54 Fed. Appx. 610, 2002 WL 31890927 (6th Cir. 2002) (reviewing arbitrator's interpretation of the phrase "coal preparation facility" and holding that the award drew its essence from the agreement).

Highway & Local Motor Freight Employees Local Union No. 667 v. Wells Lamont Corp., 69 Fed. Appx. 300, 2003 WL 21540979 (6th Cir. 2003) (reviewing arbitrator's interpretation of discharge provisions and holding that the award drew its essence from the agreement).

Mains v. LTV Steel Co., 89 Fed. Appx. 911, 2003 WL 22976624 (6th Cir. 2003) (reviewing arbitrator's interpretation of just-cause provisions and holding that the award drew its essence from the agreement).

Int'l Chem. Workers Union Council v. RJF Int'l Corp., 99 Fed. Appx. 634, 2004 WL 1152152 (6th Cir. May 19, 2004) (reviewing arbitrator's interpretation of back-pay provisions and holding that the award drew its essence from the agreement).

Highland Mining Co. v. United Mine Workers, Dist. 12, 105 Fed. Appx. 728, 2004 WL 1595197 (6th Cir. July 14, 2004) (reviewing arbitrator's interpretation of the term "workweek" and holding that the award drew its essence from the agreement).

Bixby Med. Ctr., Inc. v. Mich. Nurses Ass'n, 142 Fed. Appx. 843, 2005 WL 1389528 (6th Cir. 2005) (reviewing arbitrator's interpretation of grievance provisions and holding that the award drew its essence from the agreement).

DEI, Inc. v. Ohio & Vicinity Reg'l Council of Carpenters, 155 Fed. Appx. 164, 2005 U.S. App. LEXIS 19152, No. 04-3033, 2005 WL 2108327 (6th Cir. Sept. 1, 2005) (reviewing arbitrator's interpretation of the phrase "general contractor" and holding that the award drew its essence from the agreement).

Unpublished Opinions/Vacating Awards

Westvaco Corp. v. United Paperworkers' Int'l Union, Local No. 680, 803 F.2d 722, 1986 WL 17764 (6th Cir. Sept. 15, 1986) (reviewing arbitrator's interpretation of grievance provisions and holding that the award-which failed strictly to apply the provisions' time-limits-did not draw its essence from the agreement).

United Paperworkers Int'l Union, Local No. 943. v. Wheaton Indus., 811 F.2d 608, 1986 WL 18482 (6th Cir. 1986)

(reviewing arbitrator's interpretation of just-cause provision and holding that the award-which failed to respect a management-rights provision-did not draw its essence from the agreement).

Magic Chef, Inc. v. Int'l Molders & Allied Workers Union, 834 F.2d 172, 1987 WL 39085 (6th Cir. 1987) (reviewing arbitrator's interpretation of discharge provisions and holding that the award-which improperly resolved the tension between potentially conflicting provisions-did not draw its essence from the agreement).

United Textile Workers, Local 815 v. BASF Corp.-Fibers, 900 F.2d 261, 1990 WL 47468 (6th Cir. 1990) (reviewing arbitrator's interpretation of a job-assignment provision and holding that the award-which consulted past practice to limit the employer's rights under the provision-did not draw its essence from the agreement).

Tenn. Valley Auth. v. Salary Policy Employee Panel, 1990 U.S. App. LEXIS 21991, No. 89-6397, 1990 WL 166443 (6th Cir. Nov. 1, 1990) (reviewing arbitrator's interpretation of discharge provisions and holding that the award-which upheld the employee's termination but awarded pay based on the employer's delayed investigation-did not draw its essence from the agreement).

Mor-Flo Indus., Inc., Chattanooga Div. v. Int'l Bhd. of Elec. Workers, 1991 U.S. App. LEXIS 4073, No. 90-5605, 1991 WL 29202 (6th Cir. Mar. 7, 1991) (reviewing arbitrator's interpretation of leave-of-absence and discharge provisions and holding that the award-which failed to account for an anti-waiver provision-did not draw its essence from the agreement).

Browning-Ferris Indus. of Tenn., Inc. v. Teamsters Local Union No. 984, 1991 U.S. App. LEXIS 24760, No. 90-5933, 1991 WL 203110 (6th Cir. Oct. 10, 1991) (reviewing arbitrator's interpretation of discharge provisions and holding that the award-which required "just cause" whereas the agreement referred only to "cause"-did not draw its essence from the agreement).

Wrap v. United Paper Workers Int'l Union, Local Union 1766, 1993 U.S. App. LEXIS 6908, Nos. 92-5031, 92-5032, 1993 WL 84523 (6th Cir. Mar. 24, 1993) (reviewing arbitrator's interpretation of discharge and seniority provisions and holding that the award-which imposed an additional requirement not found in the contract-did not draw its essence from the agreement).

Voss Steel Employees Union v. Voss Steel Corp., 1994 U.S. App. LEXIS 1832, Nos. 92-2068, 92-2309, 1994 WL 28610 (6th Cir. Jan. 31, 1994) (reviewing arbitrator's interpretation of a last-chance agreement and holding that the award-which did not follow the last-chance agreement because the union never signed it-did not draw its essence from the agreement).

Hamilton-Stevens Group, Inc. v. Int'l Union, UAW, Local 1688, 1994 U.S. App. LEXIS 33651, No. 93-3472, 1994 WL 664935 (6th Cir. Nov. 23, 1994) (reviewing arbitrator's interpretation of work-assignment provisions and holding that the award-which unnecessarily consulted past practice-did not draw its essence from the agreement).

Marathon Oil Co. v. Cylinder Gas Drivers Employees-Local Union No. 283, 165 F.3d 27, 1998 WL 702357 (6th Cir. 1998) (reviewing arbitrator's interpretation of discharge provisions and holding that the award-which failed to equate

dischargeable offenses with just-cause offenses-did not draw its essence from the agreement).

United Food & Commercial Workers Union, Local No. 1099 v. Kroger Co., 1999 U.S. App. LEXIS 7366, No. 98-3423, 1999 WL 232698 (6th Cir. Apr. 12, 1999) (reviewing arbitrator's interpretation of work-assignment provisions and holding that a portion of the award-which declined to penalize an employer's violation because the penalty would serve no purpose-did not draw its essence from the agreement).

Gen. Drivers, Local 89 v. Willamette Indus., Inc., 1999 U.S. App. LEXIS 15181, No. 98-5476, 1999 WL 503465 (6th Cir. July 6, 1999) (reviewing arbitrator's interpretation of just-cause provisions and holding that the award-which failed to respect a management-rights provision-did not draw its essence from the agreement).

Omnisource Corp. v. United Steelworkers, Local 9130, 1999 U.S. App. LEXIS 17970, No. 98-3603, 1999 WL 552600 (6th Cir. July 26, 1999) (reviewing arbitrator's interpretation of transfer provisions and holding that the award-which failed to respect a management-rights provision-did not draw its essence from the agreement).

Int'l Union of Elec. Workers v. Hurd Corp., Nos. 00-5016, 00-5119, 2001 WL 210578 (6th Cir. Feb. 20, 2001) (reviewing arbitrator's interpretation of vacation-benefits provisions and holding that the award-which unnecessarily consulted past practice-did not draw its essence from the agreement).

Paper Workers, Local Union No. 5-998 v. LWD, Inc., 99 Fed. Appx. 683, 2004 WL 1171342 (6th Cir. 2004) (reviewing arbitrator's interpretation of grievance provisions

and holding that the award-which was inconsistent with evidence indicating that the grievance was not timely-did not draw its essence from the agreement).

Alken-Ziegler, Inc. v. UAW Local Union 985, 134 Fed. Appx. 866, 2005 WL 1285746 (6th Cir. 2005) (reviewing arbitrator's interpretation of the phrase "actually working" and holding that the award-which determined that the phrase was ambiguous-did not draw its essence from the agreement).

Sterling Fluid Sys. (USA), Inc. v. Chauffeurs Local Union # 7, 144 Fed. Appx. 457, 2005 WL 1653434 (6th Cir. 2005) (reviewing arbitrator's interpretation of a subcontracting provision and holding that the award-which failed to respect a management-rights provision-did not draw its essence from the agreement).

Armco Employees Indep. Fed'n Inc. v. AK Steel Corp., 149 Fed. Appx. 347, 2005 WL 1993409 (6th Cir. 2005) (reviewing arbitrator's interpretation of travel-reimbursement provisions and holding that the award-which covered some employees who had not been listed in the grievance-did not draw its essence from the agreement).

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 04-2564

[Filed January 27, 2006]

MICHIGAN FAMILY RESOURCES, INC. Plaintiff-Appellee,	)
v.	)
SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL NO. 517M, Defendant-Appellant.	)

On Appeal from the United States District Court
for the Western District of Michigan at Grand Rapids.

Before: DAUGHTREY, GILMAN, and SUTTON, Circuit Judges.

JUDGMENT

THIS CAUSE was heard on the record from the district court and was submitted on briefs without oral argument.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/Leonard Green
Leonard Green, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 1:04-CV-19

[Filed November 10, 2004]

MICHIGAN FAMILY RESOURCES, INC. Plaintiff/Counter-Defendant,	)
v.	)
SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL NO. 517M, Defendant/Counter-Plaintiff.	)

OPINION

Plaintiff, Michigan Family Resources, Inc. ("MFR"), filed a complaint against Defendant, Service Employees International Union Local No. 517M (the "Union"), seeking vacation of an arbitration award rendered on December 10, 2003. The Union has filed a counter-complaint seeking to enforce the arbitration award. Now before the Court is MFR's motion for summary judgment. For the reasons set forth

below, the Court concludes that MFR's motion should be granted and the award vacated.

I. Background and Procedural History

A. The Collective Bargaining Agreement

MFR is a non-profit corporation which operates the Federal Headstart Program for Kent County. The Union represents some of MFR's employees. MFR and the Union are parties to a collective bargaining agreement covering the period from June 1, 2001, to May 31, 2005 (the "CBA"). The CBA provides that, among other things, bargaining unit members are entitled to certain wage increases. In particular, Article 35 of the CBA provides, in relevant part:

Bargaining unit members will receive wage increases as follows:

> 1. Bargaining unit members will receive the same cost of living increases paid to other MFR employees pursuant to the directive of MFR's funding source. The parties understand that the timing and amount of any such increase is entirely dictated by the funding source.
>
> 2. During the fall semester of each program year, bargaining unit members will be reviewed and will be considered for a merit increase. Merit increases will be made effective as of the date the employee is called back to work at the start of the program year. For twelve month employees, the merit increase will be effective as of August 15 of each year. MFR will guarantee at least that for each bargaining unit employee the sum of any COLA paid during the year

> and the merit increase will be as follows: 2002 - 4%; 2003 - 2½%; 2004 - 3½%. For example, if the COLA increase for 2004 is 2.5%, effective on September 1, 2004 bargaining unit members will receive at least an additional 1.0%.

(CBA Art. 35, §§ 1, 2.) The federal government is the funding source referred to in Section 1 of Article 25.

The CBA contains a grievance procedure for disputes under the CBA, which provides for binding arbitration as the final step in the process. (*Id.* Art. 5.) The grievance procedure defines the scope of the arbitrator's authority as follows:

> The arbitrator shall have full authority to convene a hearing and require the parties to submit briefs. The arbitrator shall have full authority to render a decision which shall be final and binding upon both parties and the employees, except that the arbitrator shall not have authority to change, alter, amend, or deviate from the terms of this collective bargaining agreement in any respect. The parties shall each pay one half the cost of the Arbitrator.

(*Id.* Art. 5(c).)

Finally, the CBA contains a waiver provision, which states in relevant part:

> MFR and the Union acknowledge that all the agreements arrived at by them during the negotiations, concluded by this agreement, are set forth herein. This Agreement expresses the understanding of the parties and it will not be changed, modified, or varied, except

> by written instrument signed by duly authorized agents of the party hereto. There are no past practices which are binding upon the parties....

(*Id.* Art. 34.)

B. The Grievance and Arbitration

On or about May 13, 2003, John Barr, MFR's human resources manager, issued a memo to bargaining unit employees notifying them that the wage increase for 2003 was 2.5% as provided in the CBA. The memo stated that the COLA increase specified by the funding source for 2003 was 1.5% and that that amount would be paid retroactive to January 1. The memo also stated that the additional 1% required by the CBA would be paid to employees in September when they returned to work. The Union filed a grievance, claiming that MFR was in violation of the CBA because MFR gave its non-Union employees a 4% increase and the CBA required COLA parity between Union and non-Union employees.

The parties submitted the grievance to arbitration before Arbitrator Mark J. Glazer on September 22, 2003. The issue presented to the Arbitrator was whether Article 35 requires that Union employees receive the same COLA as non-Union employees.

The Arbitrator issued his opinion and award on December 10, 2003, and concluded that Union employees were entitled to the same COLA provided to non-Union employees. In reaching his decision, the Arbitrator noted that for 2002, after the Union filed a grievance, MFR agreed to provide Union employees the same 4% COLA paid to non-Union employees effective January 7, 2002. (Op. & Award at 6.) The

memorandum issued by MFR to describe the settlement said: "For employees covered by the SEIU contract, on a one-time non-precedent setting basis, the 4% COLA will be included with the paychecks issued January 25, 2002, rather than the start of the program year August 15, 2002." (*Id.* at 7.) The Arbitrator found that the 2002 4% COLA included a 2.5% COLA from the federal funding source and an additional 1.5% from MFR. The Arbitrator also found that MFR treated the additional 1.5% as a COLA. (*Id.* at 6.) The Arbitrator determined that Section 1 of Article 35, which refers only to COLA paid by the federal government, was ambiguous in light of MFR's prior decision to treat the entire 4% paid pursuant to the CBA as a COLA and, therefore, it was appropriate to consider evidence of the parties' past practice to determine their intent. (*Id.* at 8.) Based upon the evidence of past practice, the Arbitrator concluded that COLA parity was required. As additional support for his conclusion, the Arbitrator cited the example in the last sentence of Article 35, Section 2, which he interpreted as meaning that Union employers could receive more than the stipulated minimum payments set forth in Section 2. (*Id.* at 9.)

II. Standard of Review for Arbitration Awards

The standard for review of arbitration awards is "one of the narrowest standards of judicial review in all of American jurisprudence." *Tenn. Valley Auth. v. Tenn Valley Trades & Labor Council*, 184 F.3d 510, 514-15 (6th Cir. 1999) (quoting *Lattimer-Stevens Co. v. United Steelworkers of Am.*, Dis. 27, 913 F.2d 1166, 1169 (6th Cir. 1990)) (internal quotation marks omitted). In reviewing an award, a court's scope of review is limited to determining whether "the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority." *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38, 98 L. Ed. 2d 286,

108 S. Ct. 364, 371 (1987). So long as the arbitrator's award "draws its essence from the collective bargaining agreement" and is not merely the arbitrator's "own brand of industrial justice," the award must be upheld. *Id.* at 36, 108 S. Ct. at 370 (internal quotations omitted).

> The question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns [a] construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.

United Steelworkers of Am. v. Enter. Wheel & Car Co., 363 U.S. 593, 599, 4 L. Ed. 2d 1424, 80 S. Ct. 1358, 1362 (1960). Thus, while an arbitrator is accorded wide latitude in construing a collective bargaining agreement, the arbitrator's interpretation and award must be grounded in the language of the contract. *Misco*, 484 U.S. at 38, 108 S. Ct. at 371. The Sixth Circuit has held that an arbitrator's award fails to draw its essence from the collective bargaining agreement when:

> "(1) it conflicts with express terms of the agreement; (2) it imposes additional requirements not expressly provided for in the agreement; (3) it is not rationally supported by or derived from the agreement; or (4) it is based on general considerations of fairness and equity instead of the exact terms of the agreement."

Int'l Union, United Auto., Aerospace, & Agric. Implement Workers of Am. v. Dana Corp., 278 F.3d 548, 554 (6th Cir. 2002) (quoting *MidMichigan Reg'l Med. Ctr.-- Clare v. Prof'l Employees Div. of Local 79*, 183 F.3d 497, 502 (6th Cir. 1999)).

III. Discussion

MFR contends that the Court should vacate the Arbitrator's award because it fails to draw its essence from the CBA. MFR notes that the Arbitrator found that the pertinent language was ambiguous only after he considered evidence of MFR's prior conduct regarding the 2002 wage increase. MFR points out that the CBA says only that bargaining unit employees are to receive a 2.5% increase for 2004 and says nothing about parity with non-bargaining unit employees. Thus, MFR contends, the Arbitrator improperly created ambiguity where none existed and failed to properly apply the unambiguous terms of the CBA.

The Union agrees with MFR that the language of Article 35 is unambiguous, but it contends that the Arbitrator's decision is supported by and consistent with the provisions of the CBA. The Union's position is simple: "The clear and unambiguous language of Article 35: Wages, establishes an incontrovertible formula that unequivocally 'guarantees' that each bargaining unit member will be paid the sum of **any** COLA paid during the year plus the merit increase which must equal **at least** 2.5% in 2003." (Def.'s Br. Opp'n at 2.) According to the Union, MFR failed to comply with Article 35, Section 2 of the CBA because the COLA paid to non-Union employees was 1.5% greater than the COLA paid to Union employees and, therefore, the Union employees did not receive the "sum of any COLA" paid during 2003.

Having reviewed the relevant provisions of the CBA, the Court agrees with both parties on one indisputable point: the provisions of Article 35 regarding wages are clear and unambiguous. On this basis, the Arbitrator improperly considered evidence pertaining to the 2002 wage dispute. The Sixth Circuit has held that parol evidence relating to

construction of the contract may be considered only where the contract is ambiguous: "Where the meaning of the clause in question is clear, no construction is necessary." *Local 783, Allied Indus. Workers of Am. v. Gen. Elec. Co.*, 471 F.2d 751, 756-57 (6th Cir. 1973); *see also Excel Corp. v. United Food & Commercial Workers Int'l Union*, 102 F.3d 1464, 1468 (8th Cir. 1996) ("The arbitrator's reliance on parole evidence was erroneous because the plain language in the applicable portions of the CBA is clear and unambiguous. Although an arbitrator's award is given great deference by a reviewing court, the arbitrator is not free to ignore or abandon the plain language of the CBA, which would in effect amend or alter the agreement without authority."). In this case, the Arbitrator's award does not draw its essence from the CBA because the Arbitrator considered evidence to aid in construing the CBA when, in fact, no construction was necessary. Moreover, in doing so, the Arbitrator went beyond the express terms of the CBA by imposing additional requirements upon the parties and considering past practices, which are specifically disclaimed by the CBA's waiver provision.

Given the lack of ambiguity, the application of Article 35 to the dispute in this case is straightforward. Section 1 states that the COLA paid to Union employees will be the same as paid "to other MFR employees pursuant to the directive of MFR's funding source. **The parties understand that the timing and amount of any such increase is entirely dictated by the funding source.**" (CBA Art. 35, § 1 (emphasis added).) This language sets forth a specific and readily determinable COLA which, by its very terms, eliminates any other definition of COLA. Thus, both MFR and Union employees understand that the COLA portion of any wage increase will be determined by the federal funding source. Applying this section to the instant dispute, MFR properly

determined that the COLA for 2003 was 1.5% as specified by the funding source.

Section 2 does not alter the language of Section 1. Rather, it sets forth the procedure and timing for merit increases, if any, as well as the guaranteed minimum combined COLA and merit increase amounts for years 2002 through 2004. The example in the last paragraph explains the operation of Sections 1 and 2: "For example, if the COLA increase for 2004 is 2.5%, effective on September 1, 2004 bargaining unit members will receive at least an additional 1.0%." The 2.5% COLA is determined pursuant to Section 1 and, because MFR agreed to a minimum combined 3.5% increase, the remaining 1% represents a merit increase. Section 2 leaves open the possibility of a larger merit increase if MFR determines it to be appropriate, but it also leaves open the possibility of no merit increase. For example, if the COLA for 2004 were 3.5% and MFR decided not to award a separate merit increase, the entire 3.5% increase would be considered a COLA and there would be no separate merit increase. On the other hand, if the funding source determined that the COLA for 2004 was 5%, Union members would be entitled to more than the stipulated amount for 2004. Applying this section to the instant dispute, the Court must conclude that MFR properly determined that Union employees were entitled to an additional 1% increase as a merit increase. Moreover, MFR properly rejected the Union's demand for a 4% COLA because Sections 1 and 2 limit MFR's obligation to a 1.5% COLA in this situation, and nothing in Article 35 requires MFR to pay more than this amount.

As noted above, the Union's argument is that the language "any COLA" means that MFR is required to pay Union employees the same COLA it pays to non-Union employees. This argument fails because it reads Section 1, which states

that the "amount of any such [COLA] increase is entirely dictated by the funding source," completely out of the contract. Furthermore, taken literally, the Union's interpretation would mean that MFR could consider "any COLA" paid by any employer, governmental program, or other source located anywhere in the world because that language is not limited to a COLA paid to MFR non-Union employees. The Union's interpretation could easily prove to be a double edged sword, because if the funding source specified a 5% COLA for 2004, MFR could shirk its obligation to pay the 5% COLA under Section 1 merely by showing that someone somewhere in the world paid a COLA of less than 5% for 2004. In light of the clear language of Article 35, the Court seriously doubts that the parties intended such an absurd result.

IV. Conclusion

For the foregoing reasons, the Court will grant MFR's motion for summary judgment and vacate the arbitration award.

An Order consistent with this Opinion will be entered.

Dated: November 10, 2004

/s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 1:04-CV-19

[Filed November 10, 2004]

MICHIGAN FAMILY RESOURCES, INC. Plaintiff/Counter-Defendant,	)
v.	)
SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL NO. 517M, Defendant/Counter-Plaintiff.	)

ORDER

In accordance with the Opinion filed this date,

IT IS HEREBY ORDERED that Plaintiff/Counter-Defendant's Motion for Summary Judgment (docket no. 16) is **GRANTED**.

IT IS FURTHER ORDERED that the Arbitrator's December 10, 2003, Opinion and Award is **VACATED**.

This case is **concluded**.

Dated: November 10, 2004

/s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES DISTRICT
JUDGE